

Book Review

Golden Yoke, Silken Text

The Golden Yoke: The Legal Cosmology of Buddhist Tibet. By Rebecca Redwood French.* Ithaca: Cornell University Press, 1995. Pp. xviii, 404. \$35.00.

Law and Morality in Ancient China: The Silk Manuscripts of Huang-Lao. By R.P. Peerenboom.** Albany: State University of New York Press, 1993. Pp. xvi, 380. \$19.95.

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Rebecca Redwood French and Randall Peerenboom have written the two best books of the last twenty years on the legal cultures and legal history of Asia. In *The Golden Yoke*,¹ French describes the legal system of precolonial Tibet under the Dalai Lama's rule (1641–1959) with particular attention to its operation in the 1940s and 1950s. Although Tibetan law lasted longer than that of any other Buddhist state, French's book presents its first full-length examination. *Law and Morality in Ancient China*² looks back two millenia to examine the debates between Confucianists, Daoists, and Legalists. The discovery of the Huang-Lao *Boshu*³ (silk manuscripts) in 1973 rendered the standard accounts of early Chinese legal culture out of date, and Peerenboom is the first to offer a map of the new terrain. Since my own area of research

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1. REBECCA REDWOOD FRENCH, *THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET* (1995).

2. R.P. PEERENBOOM, *LAW AND MORALITY IN ANCIENT CHINA: THE SILK MANUSCRIPTS OF HUANG-LAO* (1993).

3. Transliterations from Chinese into the Roman alphabet in this Book Review use the Pin-Yin system (except in citations to, and quotations from, works that use the Wade-Giles system); transliterations from Indian alphabets omit diacritics; transliterations from Southeast Asian alphabets omit tone markers; and transliterations from the Greek alphabet omit accents.

lies elsewhere in Asia, I lack the expertise to engage French and Peerenboom on the minutiae of text and translation. Instead of criticizing details, therefore, this Review will focus on the authors' arguments and conclusions, which I believe have an important bearing on the way we understand our lives as lawyers. Most readers of this *Journal* regard nothing human as alien to them⁴ and will agree that "it is the legal systems of the whole world in all their variety and detail which lie at the heart of legal scholarship."⁵ From our vantage point, the Tibetan legal system described by French and the earliest Chinese jurisprudential works described by Peerenboom appear as extreme variations in the population of legal systems. I shall concentrate on what is different about these Asian traditions—on what is least familiar to us, and therefore most challenging to our local conception of what law is.

In addition, I shall indulge in the frivolous pastime of model-building. This innocent activity provides answers to the question, "How far can we generalize about Asian legal systems as a whole?" Comparative law likes to talk about the world's legal "families,"⁶ but seldom considers whether these families fit together into a higher assembly. Franz Wieacker, describing the civil law and common law families as subsets of European legal culture, is one of the few to attempt a taxonomy of legal cultures *per species et genera*.⁷ If Southeast Asia, Tibet, and Buddhist India make a convincing genus of "Buddhist law," we can similarly identify a core Buddhist legal tradition that has traveled wherever there have been Buddhist monasteries. We can then make direct comparisons between East, Central, Southeast, and South Asia by treating Buddhist law as a challenge to which they all had to respond, just as we gauge the ways in which civil law, common law, Scandinavian law, and Slavic law responded to Roman legal literature.⁸ In Tibet and Southeast Asia, the core Buddhist tradition was just as powerful an influence on local legal literature as was Roman law on Spanish and French law. Buddhism did not begin to become established in China, however, until the second century of the Common Era (CE) and affected Chinese legal culture only at the margins.⁹ Are there enough similarities between the pre-Buddhist Chinese tradition and Buddhist legal culture that they can inhabit the same genus? If so, can we keep adding other Asian legal cultures until we have a genus of Asian law? In light of the obvious differences between the laws of King Hammurabi, the maritime laws of Malacca, and the oral customs of slash-and-burn Laotian *montagnards*,

4. See TERENCE, *The Self-Tormentor*, in 1 TERENCE 113, 124 (G.P. Goold ed. & John Sargeant trans., 1979) ("homo sum: humani nil a me alienum puto").

5. Geoffrey Wilson, *English Legal Scholarship*, 50 MOD. L. REV. 818, 833 (1987).

6. Lawrence M. Friedman, *Some Thoughts on Comparative Legal Culture*, in COMPARATIVE AND PRIVATE INTERNATIONAL LAW 49, 50 (David S. Clark ed., 1990).

7. See Franz Wieacker, *Foundations of European Legal Culture*, 38 AM. J. COMP. L. 1 (1990).

8. See, e.g., *id.* at 6, 8 (discussing influence of Roman law on England, Russia, and Balkans as factor favoring their laws' inclusion in European law genus along with civil law).

9. See E. ZÜRCHER, *THE BUDDHIST CONQUEST OF CHINA* 18–80 (2d ed. 1972).

this last proposal seems overambitious. But how can we tell? How do we judge the success of comparative model-building?

The various models of Asian legal systems are pretty or ugly to the extent that they are convincing or ridiculous, but model-building is an art form we have good reason to practice. In the global legal conversation, at least in that fraction of it that takes place in European languages, Asia's fragmented whispers have been drowned out in the general hubbub. The average European¹⁰ lawyer knows little of India and China, whose written legal traditions are at least as old as his own. To reveal the overlap (if any) between what India and China can contribute to this global legal conversation is to increase their chances of making themselves heard. Duets are louder than solos.

French and Peerenboom, who both want their legal history to feed into this general conversation, open with different gambits. Peerenboom translates Chinese concepts into European jurisprudential terminology. He specifies the exact sense in which we can describe the silk manuscripts as putting forward a natural law theory and analyzes their response to three concerns that are as pressing today as when the *Boshu* was written: "the need to impose limits on those in power, to create institutional obstacles to potential abuses by the ruling class, and to rein in judicial discretion."¹¹ French's gambit is to confront European jurisprudence with Tibetan concepts. She wants her Tibetan material to shock Europe into recognizing the strangeness inherent in what Europe has hitherto taken for granted. In the closing pages of *The Golden Yoke*, French uses Tibetan legal exotica to light up the walls of Europe's cultural prison.¹² As her torch plays on the stones that confine us, we recognize that each represents a choice our culture made long ago. In this Review, I shall discuss how far each gambit may be generalized. How many of French's Tibetan legal exotica may be found elsewhere in Asia? How far can we apply Peerenboom's analysis of natural law to other Asian legal cultures? Peerenboom has fashioned natural law into a bridge capable of spanning half the globe and two millenia. I think it can be used even more widely than that. I shall suggest that three schools of natural law flourished in India, China, and the Hellenistic world during the third and second centuries

10. I use "European" as a synecdoche for the cumbersome expression "North American, European, or belonging to whatever other parts of the world care to identify themselves with an industrial present and a Christian and Greek past." The boundary between West and East is too hazy to be useful when comparing different parts of Asia with "the West." Edward Said has shown how Europe treated Cairo and Mecca as epitomizing the Oriental other, see EDWARD M. SAID, *ORIENTALISM* 31-73 (1978), but to comparative religion, Islam is a theistic, Western religion, see TREVOR LING, *A HISTORY OF RELIGION EAST AND WEST* 214, 218 (1968) (noting that Muslim monotheism is not novel, but sees itself as within tradition of Jewish prophets). Linguists, meanwhile, draw the boundary so that north India is included in the West. See, e.g., ANTHONY ARLOTTO, *INTRODUCTION TO HISTORICAL LINGUISTICS* 51, 104, 107 (1972) (classifying north Indian languages as part of Indo-European family of Europe and Middle East).

11. PEERENBOOM, *supra* note 2, at 266.

12. See FRENCH, *supra* note 1, at 343-47.

before the Common Era (BCE) and that these were particularly implicated in the birth of written legal culture.

Both gambits operate at the level of high culture. It was Chinese intellectuals, not Chinese peasants, who wrote and read the silk manuscripts, and it was one of the Dalai Lama's officials who gave French her deepest insights into Tibetan law. No doubt this intellectual view of law trickled down to the peasants in some form—how else could Asian states have survived?—but the texts containing local views of law were preserved, annotated, and discussed by a literate and leisured minority. French and Peerenboom are comparing intellectual histories, so it is the intellectual history of Europe with which they must engage. Postmodernism and specifically the Neo-Pragmatism of Jean-François Lyotard and Richard Rorty examine this history with greatest brio.¹³ Because Peerenboom uses the very latest versions of natural law theory for his comparison with the *Boshu*, he has to reckon with postmodernism. His index contains more citations to Rorty than to any other non-Sinologist.¹⁴ French uses certain postmodernist strategies to expound her Tibetan material, but does not directly discuss the postmodern critique of post-Enlightenment culture. I shall argue at the conclusion of this Review that there is an overlap between this postmodern critique and the challenges to European legal culture that French derives from Tibet. A.C. Graham (in the course of a contrast between the seeker after exact knowledge and the correlative thinker) finds a similar overlap between postmodernism and certain Chinese themes:

[M]odern philosophy has to take increasing notice of the models, analogues, metaphors, and paradigms, which still refuse to be expelled from its realm. It is driven from several directions (by [Ludwig] Wittgenstein, [Gilbert] Ryle, [Thomas] Kuhn, [Jacques] Derrida) to admit that if we dig below the surface of our supposedly exact knowledge we still find the correlative at its foundations. This recognition is the same as the sinologist's when, in searching for the metaphorical roots of a Chinese concept, he discovers that to compare and contrast it with Western concepts he has to explore their roots as well.¹⁵

Those who feel threatened by postmodern claims may find some reassurance in Asia. Though the assault on subjectivity is something new within European

13. Lyotard and Rorty are of particular interest because their ethical and political concerns are relevant to the legal conversation. Rorty "reintroduc[es] . . . the question of ethics into postmodern discourse." JOHN MCGOWAN, *POSTMODERNISM AND ITS CRITICS* 194 (1991). Lyotard has an "explicit concern with the issue of legitimacy." *Id.* at 203.

14. The two scholars whom he cites more often than Rorty are Joseph Needham and A.C. Graham, experts on Chinese science and Chinese philosophy, respectively, and both, sad to say, recently deceased.

15. A.C. Graham, *Conceptual Schemes and Linguistic Relativism in Relation to Chinese*, in *CULTURE AND MODERNITY: EAST-WEST PHILOSOPHIC PERSPECTIVES* 193, 210 (Eliot Deutsch ed., 1991).

intellectual history, Buddhist culture has theorized and practiced the deconstruction of the self for the last 2500 years.

Part I of this Review discusses French's analysis of Tibetan law and its implications for the assumptions underlying European law. Part II compares her discoveries with my own work on ancient Indian and more recent Southeast Asian Buddhism. I shall argue that what she found in Tibet is part of a more extensive Buddhist legal culture, and that what she identified as Tibetan challenges to European law are therefore of even wider import. I discuss Peerenboom's critique of the silk manuscripts' natural law jurisprudence in Part III. In Part IV, I consider what we can hope to learn by comparing the Tibetan and Chinese legal cultures, while in Part V, I offer an alternative to Peerenboom's use of natural law as a comparative tool. In conclusion, I return to French's challenges to our understanding of European law.

I. TIBETAN LAW

A. *Historical Context and Methodology of French's Work*

The Golden Yoke addresses the legal system of Tibet under the Dalai Lama, "the last medieval legal system in existence in the middle of the twentieth century."¹⁶ Since 1959, the Dalai Lama (currently in his fourteenth incarnation) continues his activities from exile in the north Indian hill-station of Dharamsala.¹⁷ Before 1959, he held high political office almost continuously since 1641.¹⁸ Thus he is a great deal more experienced than other world leaders and a great deal older. He is also a god—the Tantric deity Avalokitesvara¹⁹—but this does not impress Buddhists as much as it impresses us. Indeed, it may be a disadvantage. Even the rarified air of Tibet is too coarse for deities; in his ninth to his twelfth incarnations, the Dalai Lama died before the age of twenty-two.²⁰ Evidently he knows more than our philosophy dreams of: Most postmodernists can share in the Dalai Lama's assault on subjectivity, but none anticipated his radical deconstruction of mortality.

When French started researching in the Himalayas in the early 1980s, neither Tibet's legal history nor its legal anthropology had come into its own.

16. FRENCH, *supra* note 1, at xiii.

17. See generally TENZIN GYATSO, *FREEDOM IN EXILE: THE AUTOBIOGRAPHY OF HIS HOLINESS THE DALAI LAMA OF TIBET* (1990) (discussing fourteenth Dalai Lama's life and work).

18. See generally H.E. RICHARDSON, *A SHORT HISTORY OF TIBET* 41–205 (1962) (discussing origins and history of Lamaist state).

19. See GYATSO, *supra* note 17, at 11.

20. See MELVYN C. GOLDSTEIN, *A HISTORY OF MODERN TIBET, 1913–1951*, at 41 n.2 (1989) (noting "ample reason to suspect that some of these Dalai Lamas were 'encouraged' to leave their human form"); RICHARDSON, *supra* note 18, at 291–92 (providing dates of Dalai Lama's incarnations).

Europeans have known of the existence of Tibetan "law codes," manuscripts that set forth punishments and describe social institutions, since 1885.²¹ The Dunhuang discoveries suggest that written Tibetan laws circulated as early as the seventh century CE.²² Very little, however, has been published on the dating and interrelation of the various legal manuscripts. Dieter Schuh summarizes the present dilemma in Tibetan legal-historical research: Until the codes we already know about have been edited and until there has been a proper search for Tibetan law books of the medieval period, many questions can only be answered hypothetically or must remain unsolved.²³ French intended, after returning to academia following some years in practice, to conduct conventional anthropological research into dispute settlement in some picture-postcard mountain village.²⁴ Fortunately, her supervisor Leopold Pospisil convinced her to undertake the more important work, the study of the "last, great unknown legal system of Asia."²⁵ Because this system became history after 1959, Pospisil and French understood her task as a search for law texts among the exile community.²⁶

We should expect *The Golden Yoke* to answer Schuh's dilemma by discovering new legal manuscripts, linking them thematically to other law texts, and interpreting them sympathetically so as to reconstruct the *mentalité* of the texts' authors. It does none of these things.²⁷ Instead, it does something far more important: It preserves Tibetan legal reasoning, the key to understanding how people understood the legal literature. I use the phrase "legal reasoning" to describe the complex relationship between what lawyers do and the texts they use. "Lawyers," in turn, should be understood in an inclusive sense, for Tibet's interpretative community was not organized into

21. See SARAT CHANDRA DAS, NARRATIVE OF A JOURNEY TO LHASA IN 1881-82 app. at 23-33 (Calcutta, Bengal Secretariat Press 1885) (unpublished intelligence report, on file with the India Office Library, London). An edited version of Das's report, which does not include the appendix's material on Tibetan law, was published as SARAT CHANDRA DAS, JOURNEY TO LHASA AND CENTRAL TIBET (W.W. Rockhill ed., 1902).

22. See FRENCH, *supra* note 1, at 41, 352 n.1 (noting existence of code found at Dunhuang and attributed to reign of first historical Tibetan king in seventh century CE but also containing elements from eighth or ninth century CE); Hugh Richardson, *Early Tibetan Law Concerning Dog-Bite*, 3 BULL. TIBETOLOGY (n.s.) 5, 5 (1989) (noting that Tibetan chronicle from Dunhuang refers to code established by eighth or ninth century CE).

23. See Dieter Schuh, *Recht und Gesetz in Tibet*, in 2 TIBETAN AND BUDDHIST STUDIES (COMMEMORATING THE 200TH ANNIVERSARY OF THE BIRTH OF ALEXANDER CSOMA DE KÖRÖS) 291, 311 (Louis Ligeti ed., 1984). My thanks to Dr. Christoph Cüppers for translating the relevant part of this essay. See Letter from Christoph Cüppers, Representative Director, Lumbini International Research Institute, Lumbini, Nepal, to Andrew Huxley, Lecturer in the Laws of Southeast Asia, School of Oriental and African Studies, University of London 1 (Jan. 8, 1994) (on file with author).

24. See FRENCH, *supra* note 1, at 8.

25. *Id.*

26. See *id.* at 8-9.

27. French's next book will be legal-historical in this sense. She has evidently collected some important new legal manuscripts. See *id.* at 12; see also Rebecca R. French, *Tibetan Legal Literature: The Law Codes of the dGa' ldan pho brang*, in TIBETAN LITERATURE 438 (José Ignacio Cabezón & Roger R. Jackson eds., 1996).

a legal profession. They were, literally, legal amateurs: They read the law texts for love rather than money. Max Weber called such amateur proto-lawyers *honoratores* (well-respected men) and regarded them as the authors of legal reasoning and thus of legal culture.²⁸ In this context, then, legal reasoning is not the mental processes that resolve a hard case, but the hermeneutic that proto-lawyers apply to legal literature. It passes between the generations as an implicit part of legal education, but because it is never fully articulated, it is at great risk of being lost. Should the institutions of legal education be destroyed, that culture's legal reasoning will vanish beyond recovery within a generation.²⁹ Left to their own devices, the Tibetan lawyers would eventually have mutated into professionals,³⁰ but before this could happen, the Chinese chased them into exile. At the heart of French's book lie her two years of intensive study with one of these men. She qualified (thirty years after the legal system had ceased to exist) as the last of the pre-1959 *honoratores*³¹ and surely the first *femina honorator* among Tibetans.³² This places her on the methodological frontier between legal history (because her work is concerned with understanding legal manuscripts), legal anthropology (because she learned how to understand the manuscripts through oral discussion with indigenous informants), and comparative law (because she followed the classic comparative law strategy of qualifying as a lawyer in the system to be studied).

Kungola Thubten Sangye (1910–1989) was French's guru.³³ He is, in a sense, one of three coauthors of *The Golden Yoke*.³⁴ French the pupil, Kungola the teacher, and the intellectual traditions of Kungola's teachers from Tibet's administrative elite. His life story³⁵ typifies Weber's "well-respected man." The exam that he passed at eighteen to join the Dalai Lama's government tested his handwriting—his proficiency in the three styles of script—rather than his legal knowledge.³⁶ Nor did his jobs as local administrator, as diplomatic representative in China, or as governor of southern Tibet require any specialist knowledge of law (although it served as a useful

28. See MAX WEBER, *LAW IN ECONOMY AND SOCIETY* 198–223, 332–35 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1954). The second of the four stages of the general development of law and procedure is that of the *honoratores*, "i.e. law creation through cautelary jurisprudence and adherence to precedent." *Id.* at 303.

29. This happened in Burma after 1885, when the British abolished the Burmese legal profession. See Andrew Huxley, *The Burmese Legal Profession 1250–1885*, 63 *RECUEILS DE LA SOCIÉTÉ JEAN BODIN* (forthcoming Oct. 1997).

30. Cf. FRENCH, *supra* note 1, at 245 (noting that in major Tibetan cities, weaker parties could employ representatives to plead their cases in court, but such practice did not result in formation of distinct profession).

31. See *id.* at 10–11 (describing French's Tibetan law education).

32. Cf. *id.* at 31–32 (describing women's limited role in Tibetan legal and political systems).

33. An earlier generation of anthropologists would have called him her native informant.

34. See FRENCH, *supra* note 1, at xiv, 11.

35. See *id.* at 327–39.

36. See *id.* at 332.

bonus).³⁷ As he put it: "Officials in the government all knew that there was a standard code Some people took an interest in the law codes and some didn't."³⁸ His interest was both textual, in that he collected and edited law codes,³⁹ and practical, in that he acquired a reputation as a wise judge during his stints in eastern and southern Tibet.⁴⁰ French won her race against time, but barely: Kungola died while the book was still in draft.⁴¹

French became habituated to the Tibetan supernatural. She writes soberly about phenomena such as wish-fulfilling stones,⁴² a Buddha image that comes to life to frustrate a deer hunter,⁴³ and a state oracle who plays a major role in the deliberations of the government in exile.⁴⁴ Even when she could vouch for the miraculous herself, as when Kungola successfully dream-predicted the unexpected arrival of her husband John, she learned to treat it as routine: "[I]n the absence of telephones or other communication I began to rely on [Kungola] to let me know of John's whereabouts."⁴⁵

Perhaps the greatest Tibetan mystery of the twentieth century is why its history slipped out of sync with the rest of the world. Its premodern system of law and government survived until 1959, at least seventy years longer than the premodern systems of Buddhist Southeast Asia. This system was ousted by a classic act of nineteenth-century colonialism that occurred precisely as the winds of change were blowing European colonialism out of Africa and Asia. French alludes only briefly to the violence that Tibet has suffered since 1959,⁴⁶ but the whole tone of her book is necessarily elegiac. Dharamsala, the locus of most of her research, is, for all its research libraries and conference centers, still a refugee camp at heart. Her most important informants were refugees, whose dearest wish was for circumstances to change sufficiently to enable them to return to Lhasa. She had to contend, therefore, with a double exile in place and time. Her informants were nostalgic for a place they had not seen for thirty years and for a time when they were thirty years younger. Were we presented with a memoir of Fulgencio Batista's Cuba based on interviews with the exile community in Miami, we would take it with a pinch of salt. How can the pangs of double exile be prevented from turning the reality of the

37. *See id.* at 334–36.

38. *Id.* at 336.

39. *See id.* at 9.

40. *See id.* at 335, 339.

41. *See id.* at 342. Tibet's loss may turn out to be America's gain. At one of their last meetings, Kungola told her that he had dreamed his next rebirth would be to an American woman. *See id.* at 341. Allowing for the normal amount of time spent in *bardo* between births, *see id.* at 11, he should be applying for admission to law school around the year 2010. Were he and French then to collaborate on an analysis of American legal culture, their contribution to comparative law would be truly unique. But I am betraying my delight that Tibet is still home to the miraculous.

42. *See id.* at 337.

43. *See id.* at 336.

44. *See id.* at 48.

45. *Id.* at 10.

46. *See id.* at 50.

past into an idealized fiction?⁴⁷ French's answer is to shift the interpretative burden onto us. She presents information not as hard nuggets of empirical evidence, but as narratives for us to interpret. Her informants become autobiographical storytellers, and it falls to us to decide whether each of them has added his own slant to a true story, or has made the whole thing up. She suspends her anthropology of law within an anthropology of memory, in which we have to choose whom to trust.⁴⁸ Of course, French's own interpretation is present within her work, coded into her presentation of the stories.⁴⁹ *The Golden Yoke* is an *Arabian Nights*⁵⁰ in which "each narrative is layered on the last, reconstituted by the next."⁵¹ Yet French does not thrust her views upon us; she leaves plenty of space for alternative readings. When, for example, Chen Kuiyuan, the First Secretary of the Tibet Autonomous Region Committee of the Chinese Communist Party, reads *The Golden Yoke*, he will be free to treat these narratives as examples of bad faith or false consciousness, of feudal mentalities failing to adjust to the modern world. Therefore, he can cling to his belief that the Dalai Lama's rule was an obscurantist oppression.⁵²

B. *Consensus and Karma in Tibetan Law*

Let us look in detail at one aspect of Tibetan law that the Chinese authorities and the exile community will interpret differently. A fourteenth-century code⁵³ indicates that the trustworthy, the virtuous, and the rich are

47. For a discussion of the difficulties of relying on Tibetan exiles' oral historical accounts, see GOLDSTEIN, *supra* note 20, at xxi–xxiii.

48. Her strategy's success is a credit to Vladimir Nabokov. The twentieth century's master of the unreliable narrator was also our supreme novelist of exile. He habituated us to read nostalgia with suspicion. See, e.g., VLADIMIR NABOKOV, *PALE FIRE* (1962).

49. See FRENCH, *supra* note 1, at 346 ("Narratives . . . are the primary presentation form in the book because Tibetans spoke about law in the form of stories with exegeses. But we can hear stories only when we already know the range of possible meanings, the correct formats, and their possible interpretive contexts.").

50. THE ARABIAN NIGHTS (Muhsin Mahdi ed. & Husain Haddawy trans., 1990).

51. FRENCH, *supra* note 1, at 347.

52. Two Chinese scholars give a typical statement of the Chinese Communist view of Lamaist Tibet: "As is well known, Tibetan feudal serfdom was a reactionary, dark social system characterized by cruelty and brutality." WANG FUREN & SUO WENQING, HIGHLIGHTS OF TIBETAN HISTORY 43 (Xu Jian trans., 1984); see also A. TOM GRUNFELD, THE MAKING OF MODERN TIBET 2 (1987) (describing Chinese Communist view of Tibetan "feudalism"). For an account of the Chinese government's intensified hostility towards Tibetan Buddhism since 1994, see TIBET INFO. NETWORK & HUMAN RIGHTS WATCH/ASIA, CUTTING OFF THE SERPENT'S HEAD: TIGHTENING CONTROL IN TIBET, 1994–1995, at 25–34, 52–70 (1996).

53. I should explain that the Tibetan codes are not primarily collections of substantive rules. Much of their text describes institutions and the behavior appropriate to institutional settings. They contain details of law court procedure and of the skills a judge needs to distinguish liar from truth-teller, good citizen from freeloader. See FRENCH, *supra* note 1, at 43. French refers to this as their "prudential or admonitory style." *Id.* Prudential or wisdom-based legal codes tend to link questions of status with questions of trustworthiness. Ernest Gellner, generalizing Sir Henry Maine's insight into premodern law, see HENRY SUMNER MAINE, ANCIENT LAW 163–65 (Ashley Montagu ed., 1986), contends that "[i]n stable, complex, agrarian societies," culture's "main role is to indicate and confirm men's status." Ernest Gellner, *What Do We Need Now?*, TIMES LITERARY SUPP. (London), July 16, 1993, at 3. Gellner has not gone on record as

overlapping categories.⁵⁴ French summarizes the relevant passage of the Tibetan code as follows:

[A] party to a suit who is distinguished by "high victorious speech" should display at least some of the Four Causes of Greatness (greatness in the heritage of paternal ancestors, greatness in acts for the country, learning, and great wealth); the Four Signs of Greatness (presenting tea and beer, wearing silk, lynx, or fox, using a *zo* [a crossbreed of a yak and a cow] and having important guests from a long distance); and the Four Qualities of Greatness (taking on a guru, taking care of one's parents, taking care of one's relatives and servants, and vanquishing enemies easily).⁵⁵

The Chinese Party Secretary would surely give a class-based critique of this passage:⁵⁶ "It's the rich whose 'high, victorious speech' prevails in court; it's the poor what gets the blame." French invites us to take a less harsh view. We should understand such passages in the light of two deep aspects of Tibetan legal culture. The first is the fundamental role of consensus in legal proceedings, which means that the poor must agree to take the blame.⁵⁷ Like Barnardine in *Measure for Measure*, they can stave off their execution by saying, "I will not consent to die this day, that's certain."⁵⁸ When punishment depends on the consent of the punished, a Marxist-Leninist view of law as power exercised by the dominant class⁵⁹ cannot tell the whole story. We would have to draw on Neo-Marxist accounts to understand how the poor, against their obvious self-interest, could be persuaded to give the necessary consent.⁶⁰ This would be one way to understand Tibetan norms (the amalgam of religion, law, and time-tested social institutions that French describes). Unlike other ethical systems that provide decision procedures for complex

sharing Maine's rather overheated desire to "penetrate as far up as we could in the history of primitive societies." MAINE, *supra*, at 115.

54. See FRENCH, *supra* note 1, at 43.

55. *Id.*

56. Cf. WANG & SUO, *supra* note 52, at 49–52 (describing Tibetan Buddhism as tool of feudal class exploitation).

57. See FRENCH, *supra* note 1, at 345.

58. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* act 4, sc. 3, ll. 54–55 (J.W. Lever ed., 1965); cf. FRENCH, *supra* note 1, at 302–03 (describing murder case in which accused's persistent denial of guilt led to lengthy detention without adjudication of guilt, because judges refused to resolve factual disputes until testimony of accusers and accused agreed).

59. See KARL MARX & FREDERICK ENGELS, *MANIFESTO OF THE COMMUNIST PARTY* (1848), reprinted in 1 *SELECTED WORKS* 33, 49 (1962) (arguing that bourgeois "jurisprudence is but the will of [the bourgeois] class made into a law for all, a will, whose essential character and direction are determined by the economical conditions of existence of [the bourgeois] class").

60. See, e.g., Alan Hunt, *Marxist Theory of Law*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 355, 361 (Dennis Patterson ed., 1996) ("The dominant ideology is the prevailing influence which forms the 'common sense' of the period and thus appears natural, normal, and right. . . . [and] cement[s] together the social formation under the leadership of the dominant class; it is this process which Gramsci called hegemony.") (citing ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI* (Quintin Hoare & Geoffrey Nowell Smith eds., 1971)).

moral situations, these norms' function was to persuade people to take responsibility for their own actions by consenting to be punished.

The second presumption, the doctrine of karma,⁶¹ means that, as a rule of thumb, the rich will indeed be more likely to tell the truth than the poor. Wealth and happiness in this life are signs of high moral standing in previous lives.⁶² To be born with such an accumulation of good karma will predispose (but *not* predetermine) one to accrue more good karma in this life.⁶³ In other words, Tibetans' concept of moral agency is very different from that of Europeans. The moral beings of the Tibetan law codes differ from our atomistic threescore-years-and-ten individuals; they are equipped with several lifetimes of relevant history, and their past and future rebirths significantly affect their present moral position.⁶⁴ The same understanding of individuality would be used to answer J.M. Balkin's questions about legal subjectivity: "What do [legal subjects] bring to the task of legal understanding? What characteristics of subjectivity produce their judgments of legal coherence?"⁶⁵ Good karma accumulated in previous rebirths will predispose the legal subject to see deeper and further into the nature of law. In Tibetan terms, French's guru was probably a good lawyer just because he rose high in the Tibetan bureaucracy from relatively humble beginnings. His meritocratic success demonstrated his accumulation of good karma and thus his potential for deep understanding.

French's explanations of what Tibetan law looks like from within will leave Chinese officials' consciences undisturbed. Their presence in Tibet rests ultimately on the Chinese claim to have replaced the medieval with the modern and thus to be acting on the side of history.⁶⁶ This claim can only be met by the retort that being born modern, or achieving that state, is morally distinguishable from having modernity thrust upon one.

61. Karma is "the residue . . . accumulated [from past deeds] that conditions both the volitional present and the future lives of a human being. A person's acts produce karma, both good and bad, which affects his or her chances for enlightenment." FRENCH, *supra* note 1, at 36.

62. *See id.* at 109 (noting hierarchical, stratified nature of Tibetan society and belief that officials were "born into their excellent situations as a result of karma").

63. *See id.* at 63 ("[E]very act done by anyone at any time is the result of both previous karma and the present possible exercise of will . . .").

64. *See id.* at 63-64.

65. J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 122 (1993).

66. *See* STEVEN LUKES, MARXISM AND MORALITY 44 (1985) (discussing Karl Marx's belief that imperialism could serve as progressive historical force); KARL MARX, *The British Rule in India*, N.Y. DAILY TRIB., June 25, 1853, reprinted in 1 MARX & ENGELS, *supra* note 59, at 345, 351 ("England, it is true, in causing a social revolution in Hindostan, was actuated only by the vilest interests, and was stupid in her manner of enforcing them. . . . [Yet] whatever may have been the crimes of England she was the unconscious tool of history in bringing about that revolution."); TIBET INFO. NETWORK & HUMAN RIGHTS WATCH/ASIA, *supra* note 52, at 43 ("[By] recall[ing] past suffering and think[ing] over the source of present happiness, and by comparing between the old and new society, we should let the young generation have the knowledge of the dark serf system and to see the Dalai clique's true color.") (quoting Tibet Autonomous Region Communist Party Deputy Secretary Ragdi).

C. *European Law Through Tibetan Eyes*

Once we have judged the credibility of French's narratives, we can consider her conclusions. Writing the book has enabled her to "think more deeply about our own unacknowledged assumptions and the possibly contingent nature of what we assume to be essential in *our* cosmology of law."⁶⁷ These are the final words in *The Golden Yoke*. They imply that one reason we should understand Tibetan law is so that our own legal tradition will appear strange to us. A distinguished civil lawyer noted that the only way European legal culture can become intelligible as a cultural entity is in contrast to other, chiefly Asiatic high cultures, "among them, as the ones reaching farthest in time and space, those of the Islamic world, India, and China. These, above all, present a challenge to Europeans to become conscious of the peculiar nature and the limitations of their own conception of law."⁶⁸ Or as Michael Anderson put it in his review of a decade of work on Indian law: "If successful, a comparative approach should serve to undermine ethnocentric notions of social ordering and stimulate a debate—somewhere between philosophy and anthropology—on the nature of justice."⁶⁹ French clearly specifies those aspects of Tibetan law from which we must learn. The final pages of her book list eight challenges.⁷⁰ Only when we have considered how our own legal culture can answer these questions will we have understood Tibetan law properly. In listing these eight challenges, I have in some cases paraphrased French rather broadly and added my own examples and spin. I have done so because I share her polemical desire to shock the academically inclined common lawyer into reexamining what has hitherto seemed obvious.

French's first challenge is to European dualisms: "Omnipresent dualisms—good/bad, nature/culture, primitive/modern, religious/secular, right/left, scholastic/scientific, faith/reason, public/private—permeate the investigation, modeling, and presentation of Western material on legal systems."⁷¹ Tibetan Buddhism's combination of "radical particularity and cosmological integration"⁷² casts doubt on all these. How, if at all, can we think without them? Europe, French notes in the second place, separates law and morality by distinguishing law's minimum acceptable standard from moralities of aspiration, which encourage us to attain the maximal standard.⁷³ What happens if we collapse this European dualism and examine both

67. FRENCH, *supra* note 1, at 347.

68. Wieacker, *supra* note 7, at 4.

69. Michael R. Anderson, *Classifications and Coercions: Themes in South Asian Legal Studies in the 1980s*, 10 S. ASIA RES. 158, 162 (1990).

70. See FRENCH, *supra* note 1, at 343–46.

71. *Id.* at 343.

72. *Id.*

73. See *id.* at 343–44 (contrasting Tibetan law's permeation by Buddhist morality with "the separation of law and morality in both Western and East Asian jurisprudence").

normative systems together? How does society educate us into being virtuous citizens? What happens to society if it can no longer do so? I shall combine French's third and fourth points thus: In Buddhism, "faith and reason, logic and compassion are all integrated."⁷⁴ Legal reasoning in such a system eschews rule and precedent in favor of factors that act concurrently to determine the unique situation.⁷⁵ Some heterodox European lawyers, such as the American Realists and the Critical Legal Studies movement, have argued against the reification of rules and doctrine.⁷⁶ Is this the same thing? Fifth, we are too prone to demand finality in legal process.⁷⁷ Is this connected with our wish that truth should be guaranteed by some transcendent supertruth? The sixth aspect French would have us consider is the continuing need for consent to social institutions.⁷⁸ By way of analogy, if we lawyers breach professional norms, we risk disbarment.⁷⁹ We volunteer to be bound by our professional code and can generally withdraw from it whenever we choose.⁸⁰ So it was with the *Vinaya* (the Buddhist monastic code), which lies at the heart of Buddhist legal culture.⁸¹ Although we cannot imagine a national legal system working on such voluntarist principles, the Tibetans could. Their civil, and even much of their criminal, process depended on the defendant's consent.⁸² In social contract language, the state remained bound, but the individual could cancel his obligations at any time. Is this a satisfactory compromise between anarchy and law? What changes would our culture have to undergo before it would work for us? The seventh challenge asks, "Why dichotomize religious law and secular law?"⁸³ If you find it difficult to imagine religion without God, you will be misled by calling Buddhism a religion. It is more like a philosophy with a strong ethical element.⁸⁴ Such a description also applies to

74. *Id.* at 344.

75. *See id.*

76. *See generally* Guyora Binder, *Critical Legal Studies*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY*, *supra* note 60, at 280 (arguing that Critical Legal Studies extends Legal Realism by demonstrating that not only legal rules, but also social and individual interests they protect, are indeterminate); Brian Leiter, *Legal Realism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY*, *supra* note 60, at 261, 265–71 (describing Legal Realists' rule-skepticism); *id.* at 275–76 (describing Legal Realist critique of formalist faith in abstract legal principles).

77. *See* FRENCH, *supra* note 1, at 344–45 (contrasting "lack of finality and closure" in Tibetan law with American law's *stare decisis* and *res judicata* "doctrines of closure").

78. *See id.* at 345.

79. *See* CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 3.5.4, at 128–31 (1986).

80. *See id.* at 131–32 (noting that lawyer may generally resign from bar, but resignation may not be permitted or may be deemed admission if disciplinary charges are pending).

81. *See* MELFORD E. SPIRO, *BUDDHISM AND SOCIETY* 283 (1970) (noting that "monks may and do freely enter and leave the Order").

82. *See* FRENCH, *supra* note 1, at 345.

83. *Id.* at 346.

84. This is so despite the worship of the Buddha and other divinities in popular Buddhism. The Buddha is conceived of as one in a series of enlightened teachers who have instructed humanity on the fundamental laws of causation and karma and the means of escaping ignorance, suffering, and rebirth, not as an almighty ruler or creator of the universe like the God of theistic religions. *See* HELMUTH VON GLASENAPP, *BUDDHISM—A NON-THEISTIC RELIGION* 63–64, 67–80 (Irmgard Schloegl trans., George Braziller 1970) (1954). Similarly, the many lesser "gods" of Buddhism are mortal and are subject to the

Stoicism, which wrote the first chapter in our own discussions of law.⁸⁵ Buddhist and European legal cultures therefore stand or fall together: Either they are both secular, or both religious. Finally, the Pali Buddhist scriptures use the same word for truth and for keeping one's promises.⁸⁶ Morality and epistemology are therefore inextricably mingled. In Tibet, "[a] final understanding of truth, internal truth and morality, we would perhaps label personal honesty."⁸⁷ Perhaps Europeans have overemphasized epistemological techniques for proving the truth and underplayed our moral obligation to speak the truth?

Thus the Tibetan Buddhist challenges our European legal assumptions. While yoking together these eight points is novel, some of the issues are already well entrenched on the law school agenda. The sixth question, for example, raises the justification of state law, which has been the fundamental issue of our political philosophy since Thomas Hobbes and is currently debated among liberals, communitarians, and postmodernists.⁸⁸ Tibet enlivens this debate by exemplifying a hitherto unknown compromise between the pragmatic need for state law and the anarchist claim that man is born free. The second question provides a Buddhist angle on the contemporary debate between virtue ethicists and natural law theorists.⁸⁹ The first and eighth questions impinge on postmodernist topics: the wrong turn our epistemologists took three centuries ago, the connection between this and our propensity for dualistic thinking, and the problems inherent in the Cartesian dualism of mind and matter.⁹⁰ Does it follow that Tibetan Buddhism advocated what we would call anarchism, virtue theory, and postmodernism? I shall shortly turn to the relationship between Buddhism and anarchism.⁹¹ It seems plausible that Buddhism promotes virtue, an ongoing process of moral improvement, rather than adherence to a minimum moral standard, because there is evidence of a distinct Buddhist hostility to standards and rules.⁹² As for postmodernism, an assertion of common ground with Buddhism seems less convincing, given

laws of causation and karma. *See id.* at 30. For a discussion of karma, *see supra* notes 61–64 and accompanying text; for a discussion of Buddhist causation, *see infra* notes 183–86 and accompanying text.

85. *See infra* text accompanying notes 323–30.

86. *See* I.B. Horner, *Introduction* to TEN JATAKA STORIES at vii, xix (I.B. Horner trans., 1957) ("By *sacca*, truth, is to be understood the keeping of one's word and promise rather than actual truth-speaking. Nevertheless the animals [in *Sacca Jataka*] spoke the truth when they made and later redeemed their promises.").

87. FRENCH, *supra* note 1, at 346.

88. *See* James Buchanan, *Report on the Seventh East-West Philosophers' Conference*, "Justice and Democracy: A Philosophical Exploration", 46 PHIL. E. & W. 309, 316–18 (1996).

89. For a discussion of virtue and natural law as theories of human conduct, *see* Russell Hittinger, *Natural Law and Virtue: Theories at Cross Purposes*, in NATURAL LAW THEORY 42 (Robert P. George ed., 1992).

90. *See* Dennis Patterson, *Postmodernism*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY, *supra* note 60, at 375, 376–80.

91. *See infra* notes 158–69 and accompanying text.

92. *See infra* notes 174–82 and accompanying text.

postmodernism's hostility to grand narratives,⁹³ and given that the cessation of suffering and the achievement of nirvana⁹⁴ are as grand a narrative as one could wish for. I shall return to this issue in Part IV. Meanwhile, I intend to broaden French's challenges to European law in two directions. In the next Part, I argue that what she has found in the Dalai Lama's Tibet is a manifestation of Buddhism in its oldest form known to us. I then turn in Part III to the single great legal culture of South and East Asia that was demonstrably not influenced by Buddhism to determine whether Han Dynasty law poses some of the same challenges as Buddhist law.

II. PALI BUDDHISM

A. *The Buddhist Sects*

Tibetan Buddhism is the youngest of the three main Buddhist traditions that are still practiced. The first Tibetan ordination of a monk took place in the eighth century CE.⁹⁵ The Tantric texts that are distinctive to Tibetan Buddhism were brought from the Pala kingdom (in present-day Bengal and Bihar) in the eighth to twelfth century CE and from Kashmir in the tenth to eleventh century.⁹⁶ French is clear that the ultimate source of Tibet's legal cosmology is Buddhist,⁹⁷ but she does not compare her Tibetan findings with the approach to law found in earlier Buddhist traditions. In this Part, I shall place her data within a wider geography and an older history. The second oldest living Buddhist tradition can be called "Chinese Buddhism," though it also spread to Korea in 372 CE⁹⁸ and thence to Japan in 552 CE.⁹⁹ The Mahayana¹⁰⁰ texts distinctive to this tradition were written in the first five

93. On the postmodern critique of grand narratives, see JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION* 18–23 (Geoff Bennington & Brian Massumi trans., Univ. Minn. Press 1984) (1979).

94. Nirvana, the attainment of which is the goal of Buddhism, is "an indescribable state of awareness that is not death, annihilation, or eternalism. . . . When the fire of ignorance and craving is gone, a person is fully 'blown out' and henceforth has sensations but is not drawn to them. This is nirvana." FRENCH, *supra* note 1, at 36.

95. See SIR CHARLES BELL, *THE RELIGION OF TIBET* 37–38 (1931).

96. See *BUDDHISM: ART AND FAITH* 104–05 (W. Zwalf ed., 1985); 3 VALRAE REYNOLDS ET AL., *CATALOGUE OF THE NEWARK MUSEUM TIBETAN COLLECTION: SCULPTURE AND PAINTING* 17–19 (2d ed. 1986).

97. See FRENCH, *supra* note 1, at 343 (describing Tibetan legal system as "thoroughly Buddhist").

98. See *BUDDHISM: ART AND FAITH*, *supra* note 96, at 235; J.N. Takasaki, *Korea and Japan, in 2500 YEARS OF BUDDHISM* 69, 69 (P.V. Bapat ed., 1959).

99. See Takasaki, *supra* note 98, at 70.

100. The Mahayana or "Great Vehicle" is the Buddhist sect prevalent in China, Nepal, Mongolia, Japan, and Korea. Tibetan Buddhism, known as Vajrayana (Thunderbolt or Diamond Vehicle), Mantrayana (Spell Vehicle), or Tantrayana (Ritual Vehicle), is sometimes regarded as a subset of the Mahayana and sometimes as a third Way along with the Theravada and Mahayana. See TENZIN GYATSO (THE FOURTEENTH DALAI LAMA), *THE BUDDHISM OF TIBET AND THE KEY TO THE MIDDLE WAY* 29–30 (Jeffrey Hopkins & Lati Rimpoché trans., 1975); 3 REYNOLDS ET AL., *supra* note 96, at 28; Richard Gombrich, *Buddhism in Ancient India: The Evolution of the Sangha*, in RICHARD GOMBRICH ET AL., *THE WORLD OF*

centuries CE in India.¹⁰¹ I shall refer to the oldest of the three traditions, whose contemporary practitioners may be found in Sri Lanka and Southeast Asia, as "Pali Buddhism."¹⁰² Its scriptures, acknowledged by Tibetan and Chinese traditions as the oldest, reached something close to their present form by the first century BCE.¹⁰³ Pali, an Indo-European language, is related to what was spoken at King Asoka's court in Magadha (in present-day Bihar) in the third century BCE, but Pali seems, like Homeric Greek, to be a composite dialect designed specifically to preserve a particular body of texts.¹⁰⁴ While the Asokan inscriptions confirm that some of the Pali scriptures were well known in third-century Magadha,¹⁰⁵ attempts to prove the authenticity of their oral transmission from the Buddha's lifetime down to Asoka's reign founder on the total absence of evidence independent of the scriptures themselves. Indeed, there is still a lively debate over whether the Buddha was born in 563, 485, or 450 BCE.¹⁰⁶ The Pali scriptures that are regarded as canonical¹⁰⁷ form a library about twenty times the length of the Christian Bible. Unless spectacular new discoveries are made,¹⁰⁸ attempts to present "what the real Buddha actually taught" will continue to lack historical persuasiveness.¹⁰⁹ Nonetheless, the Pali canon, though removed by as much as five centuries from the Buddha's lifetime, remains the starting point for any investigation of early Buddhism.

B. *The Buddhist Order and Its Monastic Code*

The Pali scriptures give conceptual priority to the most legalistic of their

BUDDHISM 77, 86-87 (Heinz Bechert & Richard Gombrich eds., 1984). On the Theravada, see *infra* note 102 and accompanying text.

101. See Gregory Schopen, *Deaths, Funerals, and the Division of Property in a Monastic Code*, in *BUDDHISM IN PRACTICE* 473, 476 (Donald S. Lopez, Jr. ed., 1995).

102. This is the sect known as the Theravada or "Doctrine of the Elders," sometimes derogatorily called the Hinayana or "Lesser Vehicle."

103. See K.R. Norman, *The Pali Language and Scriptures*, in *THE BUDDHIST HERITAGE* 29, 37 (Tadeusz Skorupski ed., 1989).

104. See O. VON HINÜBER, *The Oldest Literary Language of Buddhism*, in *SELECTED PAPERS ON PALI STUDIES* 177, 193-94 (1994) (arguing that Pali and Buddhist Sanskrit descended from "Buddhist Middle Indic," which, like Homeric Greek, was literary lingua franca disconnected from regional vernaculars).

105. See Gombrich, *supra* note 100, at 82-83.

106. See ANDREW SKILTON (DHARMACARI STHIRAMATI), *A CONCISE HISTORY OF BUDDHISM* 19 (1994).

107. Pali Buddhists have been deeply concerned with questions of canonicity and exclusion. See generally Steven Collins, *On the Very Idea of the Pali Canon*, 15 *J. PALI TEXT SOC'Y* 89 (1990) (arguing that Pali Canon is not pre-Theravada corpus of Early Buddhist texts, but rather is product of deliberate canon formation by Theravada in first few centuries CE).

108. I fear that the recently announced discovery of Buddhist manuscripts from Afghanistan or northern Pakistan dating to the end of the first or start of the second century CE will not be spectacular enough for these purposes. See Dalya Alberge, *The Buddhist Scrolls: Buddhist 'Dead Sea Scrolls' Found by Library*, *TIMES* (London), June 26, 1996, available in LEXIS, News Library, Curnws File; *British Library Acquires Buddhist 'Dead Sea Scrolls'*, *L.A. TIMES*, July 13, 1996, at B5.

109. See Steven Collins, *The Lion's Roar on the Wheel-Turning King: A Response to Andrew Huxley's "The Buddha and the Social Contract"*, 24 *J. INDIAN PHIL.* 421, 422 (1996).

texts.¹¹⁰ The *Vinaya*, which contains rules about the behavior of monks and the institutional capacities of the monastery, comes first of the three scriptural subdivisions.¹¹¹ The early Orientalist scholars who focused on “sutras and philosophical texts rather than on community-directed vinaya texts and their commentaries”¹¹² obscured this strong legal element. We are now belatedly recognizing that India produced a Buddhist, as well as a Hindu, law. Duncan Derrett, who has devoted most of his career to investigating the Hindu tradition, regards the Buddhist monks as more sophisticated lawyers than the Hindu *sastris*.¹¹³

It is a pity that the juridical ability indirectly available to the *sastris* from the works of their Buddhist and conceivably also their Jaina colleagues was not utilised [in the *dharmasastras* or ancient Hindu law texts] or even reflected . . . [F]urther investigation [is needed] of what Buddhist scholars were thinking and how far they solved problems which Hindu writers are in general content to pass over in their surviving treatises.¹¹⁴

I would add to this that the Buddhist legal culture enshrined in the *Vinaya* has influenced much more of Asia than the Hindu legal culture of the *dharmasastras*.

The Buddha created an institution, the community of monks, whose function was to facilitate enlightenment. Members of the institution depended on the charity of nonmembers for their daily bread, but had to compete with others who might claim to be more ascetic or better magicians. The new institution needed a brand identity to position it within this charity market and an organizational flowchart to get things done. The *Vinaya* met both these needs.¹¹⁵ The recension of the *Vinaya* in Pali, like the other four that have survived in full,¹¹⁶ is organized around a common normative core, which has

110. See CHARLES S. PREBISH, *A SURVEY OF VINAYA LITERATURE* at viii (Dharma Lamp Series No 1, Charles S. Prebish ed., 1994).

111. See Oskar von Hinüber, *Buddhist Law According to the Theravada-Vinaya: A Survey of Theory and Practice*, 18 J. INT'L ASS'N BUDDHIST STUD. 7, 8 (1995).

112. Frank Reynolds, *Buddhism and Law—Preface*, 18 J. INT'L ASS'N BUDDHIST STUD. 1, 3 (1995). *Sutras* (*suttas* in Pali) are doctrinal texts believed to be discourses of the Buddha. See SKILTON, *supra* note 106, at 79–83.

113. The *sastris* are the scholars of the *sastra* or Hindu sacred texts.

114. J. Duncan M. Derrett, *Adattadanam: Valuable Buddhist Casuistry*, 7 INDOLOGICA TAURINENSIA 181, 194 (1979). These comments follow his comparison of Hindu and Buddhist legal learning in an area that is a good test of legal sophistication: how complex ideas of ownership arise out of the defenses raised to a charge of theft. See *id.* at 181–86.

115. See G.S.P. MISRA, *THE AGE OF VINAYA* 21–22, 111 (1972).

116. See PREBISH, *supra* note 110, at 46, 56, 70, 84. Of these the *Dharmagupta* is used by Chinese Buddhists, and the *Mula-Sarvastivada* by Tibetans. See BHIKSUNI JAMPA TSEDROEN, *A BRIEF SURVEY OF THE VINAYA* 26–28 (1992). Compare ÉTIENNE LAMOTTE, *HISTORY OF INDIAN BUDDHISM FROM THE ORIGINS TO THE SAKA ERA* 165–71 (Publications de l'Institut Orientaliste de Louvain No. 36, Institut Orientaliste, Université Catholique de Louvain, Sara Webb-Boin trans., 1988) (1958) (analyzing structure of different recensions, discussing their compilation and translation at different dates, and arguing that they represent divergent scholastic traditions), with Charles S. Prebish, *Recent Progress in Vinaya Studies*, in

grown out of two very early lists. The *Patimokkha* lists 227 activities that a monk must avoid on pain of penalty, the four most serious being murder, theft, sex, and boasting of one's spiritual achievements.¹¹⁷ The *Kammavaca* lists a series of formulae by which the monks living within a particular *sima* (parish) can make collegiate decisions, for example, to ordain a new monk or expel an old one.¹¹⁸ The *Vinaya* is divided into the *Suttavibhanga*, which expounds the *Patimokkha*, and the twenty chapters of the *Khandaka*, which expound the *Kammavaca*.¹¹⁹ In our terms, then, half of the *Vinaya* concerns misdemeanors that an individual monk should avoid, and the other half explains monastic constitutional and administrative law.

When the canon was committed to writing around the last century BCE, it froze the legal developments that had taken place during Buddhism's first few centuries. The written version, known subsequently as the *Vinayapali*, reveals developments that are unmistakably legal. First, the most important *Patimokkha* rules were equipped with their own "casebooks" recounting decisions in borderline cases.¹²⁰ Second, every word of the definition of each rule was glossed and analyzed in an exhaustive exercise in statutory interpretation.¹²¹ Third, a body of legal specialists called *vinayadharas* had emerged, tracing their discipline back to Upali, whom the Buddha appointed as his specialist in *Vinaya* matters.¹²² An important part of their function was to memorize the *Vinayapali* text,¹²³ but they were also called on to settle disputes as to what the text might mean.¹²⁴ As they did not ply their skills for hire and could not be paid in anything other than prestige, we cannot describe them as a legal profession.¹²⁵ However, they fit very neatly into Weber's category of *honorarios*. Unfortunately, *Vinaya* studies had not progressed sufficiently by the turn of the century for Weber to realize this. Hence, he made dogmatic statements that, with hindsight, are simply wrong:

STUDIES IN PALI AND BUDDHISM 297, 298–99 (A.K. Narain ed., 1979) (arguing that doctrinal differences, not disputes over *Vinaya*, accounted for Buddhist sectarianism, but only sects with vigorous *Vinaya* traditions endured).

117. See OSKAR VON HINÜBER, A HANDBOOK OF PALI LITERATURE 9–12 (Indian Philology & S. Asian Stud. No. 2, Albrecht Wezler & Michael Witzel eds., 1996); von Hinüber, *supra* note 111, at 8–9; see also FRENCH, *supra* note 1, at 41–42 (noting that these four prohibitions were adopted directly from Tibetan Buddhist canon into Tibetan codes as "the Four Fundamental Laws").

118. See SKILTON, *supra* note 106, at 75–76; VON HINÜBER, *supra* note 117, at 15–17.

119. See SKILTON, *supra* note 106, at 76–77; VON HINÜBER, *supra* note 117, at 13–17.

120. See VON HINÜBER, *supra* note 117, at 13.

121. See *id.*

122. See Andrew Huxley, *The Vinaya: Legal System or Performance-Enhancing Drug?*, in 4 *BUDDHIST FORUM* 141, 153, 162 (Tadeusz Skorupski ed., 1996) (discussing Upali); von Hinüber, *supra* note 111, at 28 (discussing *vinayadharas*).

123. See SUKUMAR DUTT, *THE BUDDHA AND FIVE AFTER-CENTURIES* 92, 99 (1957).

124. See UMA CHAKRAVARTI, *THE SOCIAL DIMENSIONS OF EARLY BUDDHISM* 131 (1987) (noting that "[e]ven in the lifetime of the Buddha, Upali was sometimes called upon to give his judgment on disputes").

125. The thirty-seventh of the 227 *Patimokkha* rules forbids monks from handling gold and silver (which is usually taken to mean any form of money). See 2 *THE BOOK OF THE DISCIPLINE (VINAYA-PITAKA): (SUTTAVIBHANGA)* 99–105 (I.B. Horner trans., 1940). The thirty-ninth rule forbids them from engaging in trade. See *id.* at 109–12.

"Yet even the relatively worldly ethics of Buddhism was so preoccupied with conscience on the one hand and ritual formalism on the other that a system of sacred 'law' could scarcely develop as the subject matter of a specialized learning."¹²⁶

This Buddhist legal tradition continues to flourish.¹²⁷ Developments during the last two millenia can be split into three periods. From the first to the sixth century CE was the age of commentary, culminating in the encyclopedic *Samantapasadika* ("The Thoroughly Inspiring").¹²⁸ This work, attributed to the great commentator Buddhaghosa, defines Pali Buddhism. One is a Theravada Buddhist (a follower of the Doctrine of the Elders) if and only if one submits to its interpretations. A measure of its global influence is that it was translated into Chinese within a century¹²⁹ and translated into Japanese a little later.¹³⁰ From the seventh to the fourteenth century CE was the age of subcommentary, culminating in three extant works giving rival interpretations of the *Samantapasadika*.¹³¹ By this stage, for which Pali Buddhist sources can be checked against other accounts, it is clear that disputed *vinayadhara* lineages best explain the constant splits and occasional reunifications that divided the monkhood. Much of the subcommentarial discussion takes the form: "The issue in dispute was A.¹³² X's view was this, and Y's view was that."¹³³ Usually it is not clear whether the dispute concerned a hypothetical or a real case, but the consequences were real enough: X's pupils and Y's pupils regarded each other as shameless monks persisting in a misinterpretation of the *Vinaya*, and a new monastic lineage was formed.¹³⁴ The far end of the list is fixed ("Upali learned the *Vinaya* from the Buddha, Dasaka learned it from Upali . . ."),¹³⁵ the middle is

126. WEBER, *supra* note 28, at 236.

127. The most recent published work by a *vinayadhara* of which I am aware emanates from California. See THANISSARO BHIKKHU (GEOFFREY DEGRAFF), *THE BUDDHIST MONASTIC CODE. THE PATIMOKKHA TRAINING RULES TRANSLATED AND EXPLAINED* (1994).

128. See VON HINÜBER, *supra* note 117, at 103–09. The complete Pali text has not been translated into English, but for an English translation of a Chinese translation, see P.V. BAPAT & A. HIRAKAWA, *SHAN-CHIEN-P'I-P'O-SHA: A CHINESE VERSION BY SANGHABHADRA OF SAMANTAPASADIKĀ COMMENTARY ON PĀLI VINĀYA TRANSLATED INTO ENGLISH FOR THE FIRST TIME* (1970).

129. See J. Takakusu, *Pali Elements in Chinese Buddhism: A Translation of Buddhaghosa's Samantapasadika, a Commentary on the Vinaya, Found in the Chinese Tripiṭaka*, 28 J. ROYAL ASIATIC SOC'Y (n.s.) 415, 416 (1896).

130. See M. Nagai, *Buddhist Vinaya Discipline or Buddhist Commandments*, in *BUDDHISTIC STUDIES* 365, 368 (Bimala Churn Law ed., 1931).

131. See VON HINÜBER, *supra* note 117, at 103, 159, 170–75.

132. See, e.g., BAPAT & HIRAKAWA, *supra* note 128, at 200–01 (posing and answering question at what stage of corporeal decomposition necrophilia becomes impossible).

133. Much as the *vinayadharas'* debates about the fine points of the monastic code produced a tradition of commentary and subcommentary, the scholastic civil lawyers of Europe produced a rich tradition of gloss and argument over the details of the *Corpus Iuris Civilis*. See, e.g., PETER STEIN, *REGULAE IURIS* 158 (1966) (recounting story of Peter Abelard's boast that he could construe any provision of *Corpus Iuris Civilis* and his rivals' mockery of his bafflement by obscure provision).

134. See Gombrich, *supra* note 100, at 82.

135. See, e.g., N.A. JAYAWICKRAMA, *THE INCEPTION OF DISCIPLINE AND THE VINAYA NIDANA: BEING A TRANSLATION AND EDITION OF THE BAHIRANIDANA OF BUDDHAGHOSA'S SAMANTAPASADIKĀ*, THE

negotiable, and the near end (whether one learned the *Vinaya* from X or Y) is factual. From the fifteenth to the twentieth century has been the age of *Vinaya* treatises, which are freestanding textbooks that break with the tradition of gloss and subgloss. In the Pali Buddhist world, this has coincided with an increased localization of *Vinaya* traditions. At the beginning of this century, a Thai monk closely connected to the ruling family wrote a monumental *Vinaya* treatise,¹³⁶ which is immensely influential in Thailand but ignored in Burma. Burma's own *Vinaya* literature since the seventeenth century has typically taken the *Wini Pyatton* ("Vinaya Examples") form: "The decisions on controversial *Vinaya* points of *Thera* [Elder] X."¹³⁷ Just how central these works were to Burmese culture became clear at the turn of the century. Because the Burmese had their own printing presses up and running before the final British invasion, they were able to control which of their manuscripts should be preserved in print. As soon as the British Judicial Commissioner for Upper Burma commissioned a printed digest of Burmese secular law texts,¹³⁸ the Burmese responded with two digests of their recent *Vinaya* literature.¹³⁹

C. The Monastic Code's Influence

If Buddhism was, as the Victorian poet Edwin Arnold put it, the Light of Asia, *Lux Asiae*,¹⁴⁰ then the *Vinaya* has a good claim to be *Lex Asiae*. A *Vinaya* text was first translated into Chinese around 250 CE,¹⁴¹ but the Chinese did not have a complete *Vinaya* until the late fourth or early fifth

VINAYA COMMENTARY 55-56 (1962).

136. 1 KROM PHRAYA VAJIRANANAVARORASA, *THE ENTRANCE TO THE VINAYA: VINAYAMUKHA* (1969).

137. One is the *Wini Pyatton* of the Thilon *sayadaw*, written around 1850 and published in 2 [FIRST] MAUNGDAUNG SAYADAW ET AL., *VINAYA PAKINNAKA VINICCHAYA KYAN* 547 (1901). Although Burmese publishing conventions in the late nineteenth and early twentieth centuries did not provide for identifying the compiler or editor of a collection of religious texts, this book is known to have been compiled by Saya Pye, the greatest Burmese Pali scholar of the turn of the century.

Learned Burmese monks are referred to by the formula "X *sayadaw*," which identifies their home village. It means the abbot (literally the "royal teacher") who came from village X.

138. 1 U GAUNG, *A DIGEST OF THE BURMESE BUDDHIST LAW CONCERNING INHERITANCE AND MARRIAGE; BEING A COLLECTION OF TEXTS FROM THIRTY-SIX DHAMMATHATS: INHERITANCE* (Rangoon, Burma, Superintendent, Gov't Printing 1898); 2 U GAUNG, *A DIGEST OF THE BURMESE BUDDHIST LAW CONCERNING INHERITANCE AND MARRIAGE; BEING A COLLECTION OF TEXTS FROM THIRTY-SIX DHAMMATHATS: MARRIAGE* (Rangoon, Burma, Superintendent, Gov't Printing 1899).

139. 2 [FIRST] MAUNGDAUNG SAYADAW ET AL., *supra* note 137; 1 VINAYA SAMUHA VINICCHAYA KYAN (Mandalay, Burma, Mandalay Taing Thatin Sa Bon Hneit Thike 1899); 2 VINAYA SAMUHA VINICCHAYA KYAN (1901); 3 VINAYA SAMUHA VINICCHAYA KYAN (1902). The editor of the first volume of *Vinaya Samuha Vinicchaya Kyan* was U Nirodha. See L.D. BARNETT, *A CATALOGUE OF THE BURMESE BOOKS IN THE BRITISH MUSEUM* 245 (1913). U Nirodha is also believed to have edited the second and third volumes.

140. See EDWIN ARNOLD, *THE LIGHT OF ASIA* (Routledge & Keegan Paul Ltd. 1964) (1880); see also PHILIP C. ALMOND, *THE BRITISH DISCOVERY OF BUDDHISM* 1 (1988) (discussing surge in awareness of Buddhism in late Victorian England resulting from *The Light of Asia*).

141. See Erik Zürcher, 'Beyond the Jade Gate': *Buddhism in China, Vietnam and Korea*, in GOMBRICH ET AL., *supra* note 100, at 193, 197.

century.¹⁴² Only when the pilgrim monks¹⁴³ returned to China with *Vinaya* texts from different traditions did the Chinese begin to dispute which *Vinaya* tradition was best, and not until the seventh century CE did the *Dharmagupta Vinaya* prevail.¹⁴⁴ The Tibetans, encountering Buddhism later, distinguished the canonical *Vinaya*, which became part of the *Kangyur*, from the *Mula-Sarvastivada* commentaries, which were inserted in the *Tangyur*.¹⁴⁵ José Cabezón reports that rival Tibetan lineages negotiated which *Vinaya* works should be included in their common canon.¹⁴⁶ In the thirteenth and fourteenth centuries, the Tibetans produced at least two subcommentaries on the *Vinaya*, and later, in the age of treatises, “each cloister university ha[d] their own textbooks.”¹⁴⁷ Wherever Buddhist monasteries were to be found, there were also *vinayadharas* organizing their materials into such legalistic formulations as:

If a Bhikkhu [monk], with the idea of killing, digs the earth and makes a pit with the intention that Mr. So and So should fall into it and die, then at the very first digging and the coming out of the earth from the pit, he becomes guilty of a Dukkata [slight] offence. If by falling into the pit, one experiences pain, then he becomes guilty of a Thullaccaya [grave] offence. If he dies, then one becomes guilty of a Parajika offence [the most serious category, the punishment for which was expulsion from the Order].¹⁴⁸

The *Vinaya* commentaries developed such technical complexities for procedural as well as substantive law:

It is possible that any [collegiate monastic decision] might fail . . . , if there is a mistake regarding the topic to be dealt with . . . , the announcement . . . , the subsequent proclamation . . . , the boundary . . . , which has to be determined in order to include the complete [community of monks], and, finally, regarding the assembly . . . , that is of those monks whose presence in person . . .

142. See ZÜRCHER, *supra* note 9, at 204, 229–30 (noting that complete *Vinaya* was translated into Chinese only under sponsorship of Shih Hui-yuan (334–417 CE)).

143. These monks were Faxian at the end of the fourth, Xuanzang in the early seventh, and Yijing in the late seventh century. See SKILTON, *supra* note 106, at 152, 160, 167–68; Gombrich, *supra* note 100, at 78; K.A. Nilakanta Sastri, *Chinese Travellers, in 2500 YEARS OF BUDDHISM*, *supra* note 98, at 254; Zürcher, *supra* note 141, at 198.

144. See Bangwei Wang, *Buddhist Nikayas Through Ancient Chinese Eyes*, in *BUDDHIST STUDIES PRESENT AND FUTURE* 65, 70–71 (Ananda W.P. Guruge ed., 1992).

145. See José Ignacio Cabezón, *The Canonization of Philosophy and the Rhetoric of Siddhanta in Tibetan Buddhism*, in *BUDDHA NATURE* 7, 9 nn.5–6 (Paul J. Griffiths & John P. Keenan eds., 1990).

146. See *id.* at 7–8, 13–14.

147. TSEDROEN, *supra* note 116, at 82.

148. BAPAT & HIRAKAWA, *supra* note 128, at 324–25. On the elaboration of the degrees of offenses, see Charles S. Prebish, *Vinaya and Pratimoksa: The Foundation of Buddhist Ethics*, in *STUDIES IN HISTORY OF BUDDHISM* 223, 224, 233 (A.K. Narain ed., 1980).

or whose consent . . . is required, if they are absent because of an urgent reason.¹⁴⁹

Did this *Vinaya* legal culture inform the law that applied to the laity? With regard to Tibet, French has no doubts:

The *Vinaya*, with its elaborations of the important factors in decision-making, the credibility of evidence, the faults of bad intentions, the appropriate circumstances under which to bring up a legal case, the correct speaking style of an accuser, and comprehensively delineated offenses with corresponding penalties, stood as the backdrop for the entire secular legal system.¹⁵⁰

The position in Southeast Asia is equally clear.¹⁵¹ The *Vinaya* has played the same classical law role as Romano-Canonical Law in Europe.¹⁵² China is a more difficult case. The *Vinaya* did not shape Chinese law from the beginning, as it did in Central and Southeast Asia, but claims have been made for a more marginal influence. Three spheres have been suggested: that the *Vinaya*'s emphasis on intention sharpened the Chinese distinction between *mens rea* and negligence; that it served as a model for the Tang Dynasty's modifications to the legal and bureaucratic system; and that the *lu-shi*, the Chinese *vinayadharas*, were the first Chinese legal specialists.¹⁵³

The *Vinaya* could be a real influence on local law without being an important influence. As Alan Watson has demonstrated, legal transplants can be trivial, almost meaningless events. Watson portrays the typical author of law texts as a *bricoleur*, a cut-and-paste artist making serviceable verbiage from the scraps, translations, and subclauses that weigh down his shelves and clog his hard drive.¹⁵⁴ A moment's reflection on how we draft our own legal

149. O. VON HINÜBER, *Buddhist Law and the Phonetics of Pali*, in VON HINÜBER, *supra* note 104, at 198, 201 (quoting *Vinaya*) (citation omitted). Ellipses indicate omission of the Pali terms whose translations are provided.

150. FRENCH, *supra* note 1, at 79. She reports a fascinating claim by a former administrative assistant that the codes for the laity are more Catholic than the Pope. The *Vinaya* spells out punishments in a legalistic way, but the codes restrict themselves to giving a method by which each situation can be investigated. *See id.* at 317-18.

151. For the influence of Buddhism on northern Thai legal texts from the fourteenth century on, see Aroonrut Wichienkeeo, *Lanna Customary Law*, in THAI LAW: BUDDHIST LAW—ESSAYS ON THE LEGAL HISTORY OF THAILAND, LAOS AND BURMA 31, 34-37 (Andrew Huxley ed., 1996). For examples of Buddhist legal provisions and illustrative stories that occur widely throughout Southeast Asian legal literature, see Andrew Huxley, *Introduction to THAI LAW: BUDDHIST LAW—ESSAYS ON THE LEGAL HISTORY OF THAILAND, LAOS AND BURMA*, *supra*, at 1, 19.

152. Happily, the *Vinaya* lacks the Roman fixation on power and ownership—*imperium* and *dominium*.

153. See Luke T. Lee & Whalen W. Lai, *The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist*, 29 HASTINGS L.J. 1307, 1314 (1978). This is the only published consideration of the issue of which I am aware.

154. See ALAN WATSON, *THE EVOLUTION OF LAW* 73-76 (1985) (arguing that legal institutions can be borrowed, in whole or in part, even by societies lacking donor's social institutions corresponding to borrowed legal institutions, and that Roman law was thus widely borrowed into customary law systems); ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 95-101 (1974) (arguing that

documents adds a disturbing plausibility to his picture. Perhaps, then, when Tibetan and Southeast Asian authors began to write law, the *Vinaya* was simply the nearest text to hand. French claims, however, that Buddhism influenced Tibetan law at a deeper level. Tibetan law was “thoroughly Buddhist”¹⁵⁵ in that its unspoken assumptions, “the elements of the cultural backdrop,”¹⁵⁶ derived from Buddhism.¹⁵⁷

D. *Buddhist Anarchism and Antinomianism*

Two themes hidden deep within Buddhist legal culture are relevant to law and state. Perhaps they are better described as areas of tension, where the earliest Buddhist scriptures endorse rival positions. The first pits anarchism against kingship; the second pits antinomianism against law. The first tension inheres in the political structure that the *Vinaya* lays down. This structure combines strong local organization with anarchy at all higher levels. The *Vinaya* sets up detailed procedures for organizing monks within a parish boundary, but tells us nothing about how the parishes are to interact.¹⁵⁸ A Tibetan text lists five stances, from least to most favorable, that your parish can take towards another: You can regard them as immodest monks who only loosely observe the *Vinaya*; deaf-mute monks who do not know the scriptures; democratic monks who want to decide everything by vote; good monks who desire the general public’s earthly welfare; or good monks who seek supramundane welfare.¹⁵⁹ At the local level, monks have both government and sanctions. The *Vinaya* mentions several examples of good monks forcibly ejecting bad monks,¹⁶⁰ but these acts of violence, which depend on the ad hoc mobilization of popular anger and disapproval, are quite different from state sanctions. Lacking the state’s ability to employ executioners and prison wardens, the monkhood, like the mob, must make do with public shaming

legal borrowings are common, productive, easy, transformative, and independent of borrower’s accurate understanding of what is borrowed).

155. FRENCH, *supra* note 1, at 343.

156. *Id.* at 59.

157. I believe that the same is true of Burmese law. See Andrew Huxley, *Buddhism and Law—The View from Mandalay*, 18 J. INT’L ASS’N BUDDHIST STUD. 47 (1995) (arguing that *Vinaya* deeply influenced Burmese law for laity).

158. The position of “king of the monks” (*sangharaja*) has been invented from time to time in parts of Southeast Asia, but it has no canonical justification. See Heinz Bechert, *Aspects of Theravada Buddhism in Sri Lanka and Southeast Asia*, in THE BUDDHIST HERITAGE, *supra* note 103, at 19, 24, 26 (noting instance of rebellion against Sri Lankan king in 1760 “with the knowledge of the *sangharaja*,” although “[i]n principle, the Buddhist sangha [monastic order] has no head”); Heinz Bechert, “To Be a Burmese Is to Be a Buddhist”: *Buddhism in Burma*, in GOMBRICH ET AL., *supra* note 100, at 147, 153 (noting existence of Burmese post of *sangharaja* from eighteenth to early twentieth century and its lack of basis in *Vinaya*).

159. See ANUKUL CHANDRA BANERJEE, SARVASTIVADA LITERATURE 232 (1957) (citing Tibetan *Posadhasathapanavastu*). The list is also found in the Gilgit manuscripts. See 3 GILGIT MANUSCRIPTS pt. 3, at xvii (Nalinaksha Dutt ed., 1943). These manuscripts were discovered in Kashmir in 1931 and are ascribed to the fifth or sixth century CE. See 1 GILGIT MANUSCRIPTS at i–ii (Nalinaksha Dutt ed., 1939).

160. See Huxley, *supra* note 122, at 151.

rituals ("charivari") and forced social isolation of an offender ("sending to Coventry"), both of which are mentioned in the *Vinaya*.¹⁶¹ The *Vinaya* does not tolerate organized violence, for a permanent machinery of repression would be bad karma for those who manned it.

Precisely the same attitudes apply to the state. There is a mainstream tradition of political philosophy in the Pali scriptures that justifies kingship as an answer to the question, "Who should punish thieves?"¹⁶² This has usually (though in my view mistakenly) been labeled "Buddhist social contract theory."¹⁶³ Yet there is also an anarchist countercurrent that condemns all state violence, however justified the punishment and however merciful the sentence. The countercurrent is most obviously visible in the *Mugha-Pakkha Jataka*,¹⁶⁴ in which the Buddha, born as the prince Temiya, uses subterfuge to escape the succession. If he reigns, he must punish, and if he punishes, he will incur enough bad karma to send him to hell.¹⁶⁵ This countercurrent still runs as strong as ever. French notices it in Tibet after four centuries of so-called theocracy. Surely a state personified by the Dalai Lama could make moral claims for itself? Apparently not: "A judge took on the karmic results of his actions as a judge, regardless of the cloak of governmental office. There were no fictitious legal entities in Tibet, no corporate veils screening individuals from legal and karmic liability."¹⁶⁶ Karma does not recognize the fiction of the state, but operates at a presocial, indeed prehuman, level where every living thing takes responsibility for its own acts. Burmese intellectuals expressed the same attitude in the 1840s during the preparation of the first English translation of a Burmese law text. The text itself drew a distinction between justified and unjustified state violence, mentioning "the judge who,

161. See *id.*

162. For the most persuasive statements of the mainstream tradition, see Balkrishna G. Gokhale, *Early Buddhist Kingship*, 26 J. ASIAN STUD. 15, 15 (1966), who argues that the Buddha favored tribal republics and feared monarchy, but saw the latter as inevitable and necessary to prevent anarchy and sought to temper royal absolutism with morality, and Stanley J. Tambiah, *King Mahasammata: The First King in the Buddhist Story of Creation, and His Persisting Relevance*, 20 J. ANTHROPOLOGICAL SOC'Y OXFORD 101, 102 (1989), who argues for a social contractarian reading of the *Agganna Sutta* as an account of the necessary election of an ideal ruler to embody and enforce virtue amidst the karmic degeneration of mankind. Other recent accounts have identified elements of sly subversion within the mainstream. See Steven Collins, *The Discourse on What Is Primary (Agganna-Sutta): An Annotated Translation*, 21 J. INDIAN PHIL. 301, 317 (1993) (arguing that *Agganna Sutta* satirizes caste society and monarchy as departures from community values of *Vinaya*); Richard Gombrich, *The Buddha's Book of Genesis?*, 35 INDO-IRANIAN J. 159, 161–63 (1992) (arguing that *Agganna Sutta*'s account of divinely ordained social structure and kingship is satirical). On the way the mainstream tradition was understood in recent centuries, see Steven Collins & Andrew Huxley, *The Post-Canonical Adventures of Mahasammata*, 24 J. INDIAN PHIL. 623, 635–37 (1996); we argue that in eighteenth- and nineteenth-century Burma, coronation oaths whose promises of just rule were believed to be enforced by supernatural curses on unjust rulers, and which some scholars interpret in social contract terms, were instead more cosmological than legal or constitutional.

163. See Andrew Huxley, *The Buddha and the Social Contract*, 24 J. INDIAN PHIL. 407, 418 (1996).

164. 6 THE JATAKA OR STORIES OF THE BUDDHA'S FORMER BIRTHS 1 (E.B. Cowell ed., E.B. Cowell & W.H.D. Rouse trans., 1907) [hereinafter JATAKA].

165. See *id.* at 11.

166. FRENCH, *supra* note 1, at 161.

abiding by the Damathat [law text for the laity], gives his decisions so as to avoid incurring the pains of hell."¹⁶⁷ The English translator added a footnote, which undoubtedly reflected the views of his Burmese advisers: "Decisions in strict accordance with the Damathat cannot be given without entailing sin on the judge, punishments being ordered in it involving death, mutilation, and pains which cannot be inflicted without sin, according to the Burman religion."¹⁶⁸ I have not yet found a Chinese statement of this theme. At least we have contemporary evidence that conversion to Buddhism had implications for law and state. In the third century CE, the Chinese governor of the city that stood near present-day Hanoi

"abandoned the norms and teachings of the former Sages and abolished the laws and statutes of the Han, and he used to wear a purple turban, to play the lute and to burn incense, and to read heterodox and vulgar religious scriptures . . . ; this, he said, contributed to the transforming influence (of his government)."¹⁶⁹

This Buddhist anarchism derives from the higher principle of nonviolence. The king is the prime target of this doctrine, because violence lies at the heart of his job. Ordinary villagers will from time to time be faced with the problem of justified violence, and Buddhist literature therefore warns them not to kill a dangerous mad bull¹⁷⁰ or use violence against a serpent that is crushing them within its coils.¹⁷¹ I expect that one or two Buddhists over the course of history have failed to adhere to this exacting standard, but it is recommended as best practice, the counsel of perfection to which king and villager alike should aspire. Buddhism regards karma (the Buddhist theory of action and reaction) as conceptually prior to dharma (the duties that Buddhas preach).¹⁷² Dharma is contingent: It becomes unknowable when there has been no Buddha to preach it within living memory.¹⁷³ Karma is basic: Our universe is constructed in such a way that violence, however justified, gets its desert. This assumption plays a role parallel to Sir Isaac Newton's observation

167. D. RICHARDSON, *THE DAMATHAT, OR THE LAWS OF MENOO, TRANSLATED FROM THE BURMESE* 154 (Maulmain, Burma, American Baptist Mission Press 1847).

168. *Id.* at 154 n.†.

169. ZÜRCHER, *supra* note 9, at 51 (quoting Chinese work *San-kuo chih*) (footnote omitted).

170. See Ch. Duroiselle, *Notes sur la Géographie Apocryphe de la Birmanie à Propos de la Légende de Purna*, 5 BULLETIN DE L'ÉCOLE FRANÇAISE D'EXTRÊME-ORIENT 146, 148–49 (1905) (recounting legend of villagers who killed and ate mad bull, after which they were reborn as animals to be killed by bull reincarnated as hunter) (citing Burmese work *Shwe Zetdaw Thamaung*, probably written in eighteenth century).

171. See R. SPENCE HARDY, *A MANUAL OF BUDDHISM, IN ITS MODERN DEVELOPMENT; TRANSLATED FROM SINGHALESE MSS.* 480 (London, Williams & Norgate, 2d ed. 1880) (citing thirteenth-century Sinhalese work *Pujawaliya* by Mayurapada).

172. See FRENCH, *supra* note 1, at 36 (explaining Buddhist doctrine as means of understanding and escaping suffering and cycle of rebirths caused by karma); see also *id.* at 70 (defining dharma as "Buddhist doctrine and practice").

173. See von Hinüber, *supra* note 111, at 7.

that every action has an equal and opposite reaction. Kings must cope with karma when punishing criminals, just as they have to cope with Newton's Third Law of Dynamics when playing pool or firing a rifle.

The second area of tension is between the mainstream Buddhist attachment to rules and the crosscurrent of antinomianism. I must define what I mean by this last word. Strong antinomianism ("The more rules you break, the closer you are to redemption.") was a latecomer to Buddhism. It is only found in some Tantric practices.¹⁷⁴ Weak antinomianism, in which "love prevails over law" and the impulsive behavior of the truly virtuous is better than a calculating obedience to rules, has been part of Buddhism from the start.¹⁷⁵ The *Vinaya* contains its own critique of the notion of rule. The monk Sona told the Buddha that his enlightenment had taught him to value nonviolence based on "the essence" over nonviolence due to "the contagion of habit and custom."¹⁷⁶ In other words, the *Vinaya* is a necessary evil: Monks must obey its rules until they are enlightened enough to do the right thing instinctively.¹⁷⁷ Not only are there accomplished individuals who are beyond law, but there are periods in human history when law is unnecessary. When the monk Bhaddali asked the Buddha why an increase in *Vinaya* rules had coincided with a decrease in the number of monks achieving profound knowledge, the Buddha replied that the preponderance of rules and the scarcity of enlightened monks were both symptoms of the general deterioration in true dharma and in life itself.¹⁷⁸ In his discussions of kingship, the Buddha made the same point about state law: It is a product of troubled times and should be tolerated rather than admired.¹⁷⁹ Kingship, taxation, crime, and punishment follow our expulsion from the prejuristic Eden.

In Pali Buddhism, the arguments for and against the rule have stabilized into a general recognition that the justice of the situation prevails. Rules merely give a first approximation to the truth, but Theravada literature loves to demonstrate the complexity of life by evoking the exceptions to rules and the occasions when following good advice has unintended consequences. This

174. See Anagarika Govinda, *Principles of Tantric Buddhism*, in 2500 YEARS OF BUDDHISM, *supra* note 98, at 357, 358 (noting that in Tantric work *Guhyasamaja*, "murder, falsehood, theft and intercourse with women are recommended"). Although Tantra is iconoclastic towards social conventions, see PHILIP RAWSON, *THE ART OF TANTRA* 24 (1973), it prescribes its own rigid rules for the performance of meditation, sexual rituals, and other spiritual practices, *see id.* at 14-16.

175. See SKILTON, *supra* note 106, at 77-79.

176. 4 THE BOOK OF THE DISCIPLINE (VINAYA PITAKA): (MAHAVAGGA) 243 (I.B. Horner trans., 1951).

177. Compare Marcus Tullius Cicero's story of Xenocrates, who, when asked what his pupils gained from his instruction, "is said to have replied: 'To do of their own accord what they are compelled to do by the law.'" CICERO, *DE RE PUBLICA*, in *DE RE PUBLICA [ET] DE LEGIBUS*, at 1, 17 (Clinton Walker Keyes trans., 1928).

178. See 2 THE COLLECTION OF THE MIDDLE LENGTH SAYINGS (MAJJHIMA-NIKAYA) 115-16 (I.B. Horner trans., 1957).

179. See Huxley, *supra* note 122, at 150.

theme occurs in one of the *suttas*¹⁸⁰ most quoted in Pali Buddhist political circles. Steven Collins summarizes it as follows:

With poverty thus widespread, one of [the king's] subjects takes something deliberately from another; he is brought before the king, who asks if it is true that he stole something; the man replies that it is. When the king asks why, the thief replies that he cannot live otherwise. The king then gives him money and urges him to use it to support himself and his family, to start up a business and to give as alms to ascetics and brahmins in order to go to heaven. This is all, of course, good Buddhist advice for the laity: the king, one might say, is doing his best at this point. The same sequence of events happens again with another person; and . . . people start to conclude—with perfect farcical logic—that the way to get money is to steal and have the king find out.¹⁸¹

That *summa ius* can mean *summa iniuria* is a favorite Buddhist rhetorical ploy. It implies that the rule is a useful didactic device, but true wisdom comes from recognizing when among the infinite variety of situations the rule should be abandoned. French finds this hostility to rules in Tibet in even stronger form: “In short, in most situations, parties, judges, and conciliators engaged in factoring, viewed each case as unique, did not cite previous legal situations as precedents, and therefore did not elaborate precedential chains of legal rules based on cases.”¹⁸²

Buddhist lawyers derive their preference for situations over rules from a more basic principle: the nature of causation. In the Pali canon, causation is analyzed as a process of codependent origination: Of the several causes that coalesce to bring about an effect, none can be singled out as *causa efficiens* or *causa sine qua non*.¹⁸³ One cause of Abraham Lincoln's demise was that John Wilkes Booth pulled the trigger. Another, and equally a cause, was the President's decision to go to the theater that night. All these codependent causes are what French terms “factors” through which a given situation is analyzed.¹⁸⁴ The Buddha's theory of causation is not a philosophical footnote to his central message; it *is* his central message.¹⁸⁵ Buddhist causation is his General Theory of Relativity applying to all events in the world, while karma

180. See *supra* note 112.

181. Collins, *supra* note 109, at 431 (footnotes omitted). In the *Vyaggha Jataka*, the trope is applied in an ecological context. See *Vyaggha-Jataka*, in 2 JATAKA, *supra* note 164, at 244, 244–46 (recounting fable in which tiger and lion, although vicious animals, are necessary to protect forest from woodcutters).

182. FRENCH, *supra* note 1, at 145.

183. See DAVID J. KALUPAHANA, CAUSALITY: THE CENTRAL PHILOSOPHY OF BUDDHISM 59 (1975).

184. See, e.g., FRENCH, *supra* note 1, at 317 (discussing diverse factors considered in criminal cases).

185. See 1 THE COLLECTION OF THE MIDDLE LENGTH SAYINGS (MAJJHIMA NIKAYA) 236–37 (I.B. Horner trans., 1954) (“This was said by the Lord [Buddha]: ‘Whoever sees conditioned genesis sees *dhamma* [Pali for dharma], whoever sees *dhamma* sees conditioned genesis.’”) (discourse by Buddha's disciple Sariputta) (footnote omitted).

is his Special Theory of Relativity applying only to sentient beings and the ethics of their actions. Causation has ontological and epistemological implications. It is, says Bruce Reichenbach, "a primitive or basic relational concept, not further analysable into anything more fundamental."¹⁸⁶ In short, if we are looking for the backdrop to Buddhism, causation is as far upstage as we can get.

E. *The Nondualistic Cosmology of Tibetan Buddhism*

It is as little use looking for *the* Buddhist approach to law as it is *the* Chinese or *the* European. On the vexed question of law and the state, Buddhism provides arguments to both sides of the debate. The Pali canon, the earliest stratum of Buddhist literature, provides two examples. The countercurrent to Buddhist political thinking is Anarcho-Buddhism, which derives from karma as a basic ethical condition of the universe. The countercurrent to Buddhist law is Buddhist antinomianism, which derives from the general theory of causation. Causation and karma describe the world; the *Vinaya* and the law texts that draw on it prescribe for the world. Europeans, noticing the conceptual subservience of prescription to description, will think of their own natural law tradition. I shall return to this comparison in Part V. French does not explicitly consider natural law, but her answer can be inferred. Because natural law is intensely dualistic,¹⁸⁷ it can only usefully be compared with the concepts of another dualistic culture: "In Tibet, rational thought with its linear, dualistic, agential foundation is not primary . . . Tibetans simply had a different symbolic starting point, an initial view of the world as All-One."¹⁸⁸

Tibetan thought's symbolic starting point, its ultimate cosmological symbol, is the mandala.¹⁸⁹ French struggles to express the full significance of the mandala: "In their notion of the One, each level or unit of the whole both actually is and also reflects the All."¹⁹⁰ But who can describe a genre of the graphic arts in words alone? This is especially difficult when the Tibetans view the mandala as a mode of transport, an object to be meditated on, rather than a work of art.¹⁹¹ French's governing image of Tibetan culture

186. BRUCE R. REICHENBACH, *THE LAW OF KARMA: A PHILOSOPHICAL STUDY* 92 (1990).

187. The "natural" is privileged over the "artificial," "nature" over "human culture," and "law" over "contingency."

188. FRENCH, *supra* note 1, at 177.

189. See RAWSON, *supra* note 174, at 174-82; GIUSEPPE TUCCI, *THE THEORY AND PRACTICE OF THE MANDALA* (Alan Houghton Brodrick trans., Rider & Co. 1961) (1949); HEINRICH ZIMMER, *MYTHS AND SYMBOLS IN INDIAN ART AND CIVILIZATION* 144-46 (Bollingen Series No. 6, Joseph Campbell ed., 1946).

190. FRENCH, *supra* note 1, at 175.

191. See Janet Gyatso, *Image as Presence: The Place of Art in Tibetan Religious Thinking*, in 3 REYNOLDS ET AL., *supra* note 96, at 30 (describing Tibetan Buddhist conception of images as symbolic representations of ultimate truths, as icons of members of pantheon, and as stimuli for visualization meditation); cf. ZIMMER, *supra* note 189, at 142-43 (describing use of images in visualizing Absolute).

is not for mental virgins: Unless you have contemplated an image and let your mind wander, you will not understand why she emphasizes the mandala's qualities of dynamism and immanence. If anyone is game to try such free-association (or the more disciplined techniques of meditation), I recommend starting with a brilliantly designed double-page spread of graphics in *The Golden Yoke*.¹⁹² Tibetan Buddhism taught the faithful how they could, meditating on images such as these, visualize the entire universe and all the futures and pasts that the universe will endure.¹⁹³

III. HAN CHINA

A. *Ancient Chinese Legal Thought: The Context of the Boshu*

Law and Morality in Ancient China, like *The Golden Yoke*, is at risk of being overlooked by those who would most benefit from reading it. The story behind Peerenboom's book starts on April 4, 168 BCE, with the burial of a prince at Mawangdui in Hunan province.¹⁹⁴ Buried with him were wooden statues, meals packed in bamboo containers with lacquerware on which to eat them, silk paintings to contemplate, and silk manuscripts as a bedside library.¹⁹⁵ Silk proved to be as durable as it was luxurious: When archaeologists excavated the tomb in 1973, most of the manuscripts were still legible. They are as significant a find as the Dead Sea Scrolls¹⁹⁶ or the Nag Hammadi papyri,¹⁹⁷ opening another silk route to ancient China. They include two editions of the Daoist classic *Lao Zi*,¹⁹⁸ some short essays on what I shall call proto-science (the Yin Yang Five Phases school),¹⁹⁹ and, amounting to ten percent of the whole, the Huang-Lao *Boshu*, which is Peerenboom's subject matter.²⁰⁰ The *Boshu* consists of one work in four

192. See FRENCH, *supra* note 1, at 178–79 (depicting various mandalas). The graphics were conceived and designed by Peetie Van Etten and produced by Linda Nishio. See *id.* at xiv–xv.

193. See TUCCI, *supra* note 189, at 23 (“[A mandala] is, above all, a map of the cosmos. It is the whole universe in its essential plan, in its process of emanation and of reabsorption.”); Gyatso, *supra* note 191, at 30–31 (describing use of sacred images to assist visualization of mundane world as Pure Land realm of Buddha).

194. See PEERENBOOM, *supra* note 2, at 286 n.11.

195. See *id.* at 1.

196. THE DEAD SEA SCROLLS IN ENGLISH (Geza Vermes trans., 4th ed. 1995).

197. THE NAG HAMMADI LIBRARY IN ENGLISH (James M. Robinson ed., Members of Coptic Gnostic Library Project of Inst. for Antiquity & Christianity trans., 3d ed. 1988).

198. TAO TE CHING (D.C. Lau trans., 1963). The author of this work, by whose name it is sometimes known, was Lao Zi.

199. Yin and yang are words of uncertain original meaning that became important philosophical terms in ancient Chinese “correlative cosmology.” PEERENBOOM, *supra* note 2, at 226. “The constant cause of heaven is that forces in opposition to each other cannot both arise simultaneously. . . . The yin and yang are these mutually opposite forces. Therefore when one expands outward, the other retracts inward. . . .” *Id.* (quoting Dong Zhongshu). On the particular school known as Yin Yang Five Phases, see *id.* at 225–29, and *infra* notes 235–41 and accompanying text.

200. See PEERENBOOM, *supra* note 2, at 1, 6.

sections (or perhaps four separate works) discussing questions such as "How are we to live as individuals and as a society?" and "Is law a help or a hindrance in achieving sociopolitical order?" The four sections (or works) are *Canonical Laws*, *Sixteen Classics*, *Weighing by the Scales*, and *Origins of the Way*.²⁰¹ If they have a collective title, we do not know it.²⁰² Nor can we do anything but guess at the identity of the author(s) and the date and place of composition.²⁰³ The only certainty about the text is that it was written from within the particular Chinese intellectual tradition known as Huang-Lao.

The Huang-Lao scholars, like the Qumran sect and the Christian Gnostics, had been known only from occasional references and citations in the official chronicles and bibliographies. From these it appears that Huang-Lao thought was most influential in court circles between 206 and 140 BCE.²⁰⁴ Why should we be interested in such a short-lived ideology? The seventy-year reign of Marxism-Leninism demands our attention because we have just lived through it. The sixty-year reign of Huang-Lao thought demands our attention because it was crucial to the development of China's legal and political traditions. The Warring States, having contended from the fifth to the third century BCE, were at last unified under the Qin emperor (221–206 BCE) and his Legalist advisers. The Legalist fervor for law, centrally promulgated and universally applied, made government on an imperial scale possible, but in the matter of executing intellectual opponents and burning rival books, the Legalists' overenthusiasm has been criticized.²⁰⁵ Karen Turner calls the fall of the Qin empire "one of the most influential failures in Chinese history" because it discredited Legalism by association.²⁰⁶ Would the Qin ideal of a Greater China, like Alexander the Great's ideal of a Greater Macedon, last no more than one man's lifetime? One way or another, it endured. The founders of the Han Dynasty managed to establish stable institutions by means of which Greater China could survive and expand. From about 100 BCE, these institutions were based on Dong Zhongshu's mixture of revived Confucianism and naturalistic proto-science.²⁰⁷ Before 100 BCE, Confucian ideas could not have served the Han empire, because they were still wedded to the feudal, warlord society that the empire was trying to abolish. Until 1973, all we knew

201. *See id.* at 6.

202. *See id.* at 7–9.

203. *See id.* at 9–12.

204. *See id.* at 218; *see also* Michael Loewe, *Huang Lao Thought and the Huainanzi*, 4 J. ROYAL ASIATIC SOC'Y (3d s.) 377, 383–85 (1994).

205. The Chih-fu inscription of 218 BCE gives a glimpse of the Qin (Ch'in) Emperor's stance in such matters: "'The powerful and overbearing he boiled and exterminated; The ordinary folk he lifted and saved.'" Derk Bodde, *The State and Empire of Ch'in*, in 1 THE CAMBRIDGE HISTORY OF CHINA: THE CH'IN AND HAN EMPIRES 20, 76 (Denis Twitchett & Michael Loewe eds., 1986) (quoting 2 LES MÉMOIRES HISTORIQUES DE SE-MA TS' IEN 158 (Édouard Chavannes trans., Adrien Maisonneuve 1969) (1897)).

206. Karen Turner, *Sage Kings and Laws in the Chinese and Greek Traditions*, in HERITAGE OF CHINA 86, 88 (Paul S. Ropp ed., 1990).

207. *See* PEERENBOOM, *supra* note 2, at 255.

about Huang-Lao thinking was that it had to fit this context. It had to have differed enough from Legalism to be respectable after the fall of Qin, but have shared enough with Legalism to afford practical support to the early Han emperors.

B. *The Huang-Lao Boshu as Natural Law*

Peerenboom has undertaken to explain Huang-Lao thought so that it fits the desired context. In a close reading of the silk manuscripts, he presents Huang-Lao as a natural law theory²⁰⁸ such as Marcus Tullius Cicero²⁰⁹ or Saint Thomas Aquinas²¹⁰ could have understood fairly easily. Peerenboom then contrasts the silk manuscripts with Confucian, Legalist, and Daoist texts.²¹¹ Whereas the *Boshu* “represents an aberration within the Chinese intellectual tradition and may be of considerable interest for that reason alone, it is in its broad contours all too common within the Western.”²¹² He concludes by extrapolating from texts to people in a speculative intellectual history of the rise and fall of Huang-Lao: who wrote what, who learned from whom, and who was in which emperor’s favor.²¹³ Peerenboom is unsympathetic to Huang-Lao’s message from the grave: “How unfortunate to lie buried and neglected for 2000 years only to be unearthed in the era of postmodernism, perhaps in the history of Western philosophy the intellectual milieu least hospitable to epistemological foundationalisms, correspondence theories of truth, natural law doctrines, and the like.”²¹⁴ Rather than promoting the *Boshu* itself, *Law and Morality in Ancient China* promotes an entirely new story about the development of classical Chinese law and ethics, which (because the philosophers advised the emperor) is also a new story about the development of Chinese law. The old story proceeded from the opposition between Legalists and Confucians.²¹⁵ The Legalists preached a kind of Hobbesian positivism: Humanity was selfish and had to be frightened into restrained behavior by law (*fa*) and punishment.²¹⁶ The Confucians, as their opponents, must therefore have been natural lawyers in some sense.²¹⁷ Their rites (*li*) must have been based on the natural order of the world.²¹⁸

208. See *id.* at 27–102.

209. See HUNTINGTON CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* 127–62 (1949).

210. See *id.* at 163–204.

211. See PEERENBOOM, *supra* note 2, at 103–215.

212. *Id.* at 265.

213. See *id.* at 217–61.

214. *Id.* at 265.

215. See 1 KONRAD ZWIEGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 361–65 (Tony Weir trans., Clarendon Press, 2d rev. ed. 1987) (1977).

216. See 1 JOSEPH NEEDHAM, *THE SHORTER SCIENCE AND CIVILISATION IN CHINA* 274 (abndged by Colin A. Ronan, 1978).

217. See 1 ZWIEGERT & KÖTZ, *supra* note 215, at 361.

218. See *id.* at 362.

The new story starts with the recognition that classical Chinese philosophy had more than two schools. Peerenboom describes at least five leading players: In addition to Confucianists and Legalists, there are Daoists, proto-scientists, and the Huang-Lao themselves. If our starting point is Confucius's *Analects*,²¹⁹ the subsequent schools can be described as incorporating or reacting against elements of what went before. Peerenboom's particular talent is for defining the issues that differentiated these increasingly eclectic schools. His central contention is that the Huang-Lao, who borrowed from all four of the other schools, mixed a brew that was quite unique in Chinese intellectual history. Jurisprudentially, the author of the *Boshu* was a natural lawyer.²²⁰ Linguistically, he avowed a realist theory that names and forms correspond to the *dao*.²²¹ Sociopolitically, he viewed social class as naturally given.²²² Peerenboom explains: "These aspects of Huang-Lao philosophy are predicated on a foundational, correspondence epistemology in which one discovers *dao*, the objective natural order, articulated in terms of *li* (principles), *fa* (laws) and *xing ming* (forms and names), by eliminating subjective bias through the attainment of emptiness and tranquility (*xu jing*)."²²³ If the Huang-Lao were natural lawyers, this fortuitously provides us with a mid-Pacific stepping stone, an easy access point by which we can enter the Chinese debate on law and government. Peerenboom regards the provision of access to an otherwise unfamiliar tradition as an important part of his job.²²⁴ Given that the story of Chinese philosophy starts with the *Analects*, what kind of hermeneutical framework does he offer to help us understand Confucius?

The answer, surprisingly, is Rorty: "Rorty's antifoundationalism entails the rejection of all forms of transcendence, be they correspondence theories of knowledge, semantic theories of truth, ethical systems . . . or natural law theories . . ." ²²⁵ Steeping ourselves in Neo-Pragmatism is the best preparation for Confucius's thought, which "is best characterized in terms of

219. CONFUCIUS, *THE ANALECTS* (*LUN YU*) (D.C. Lau trans., 1979).

220. See PEERENBOOM, *supra* note 2, at 4.

221. See *id.* at 40–41. *Dao* or "Way" is one of the most important terms in Chinese thought (not only in Daoism) and can mean (in a natural law context) the "normatively correct Way" or "cosmic natural order." *Id.* at 32.

222. See *id.* at 217.

223. *Id.*

224. See *id.* at 25–26 (noting that goal of *Law and Morality in Ancient China* is to understand Chinese text in preparation for comparison with Western philosophy and for effort to use Chinese ideas to advance Western philosophy). In a different context, he notes the existence of "at least one school within the Western tradition that does philosophy in a way sufficiently similar to its Chinese counterpart to serve as a hermeneutical framework." *Id.* at 58.

225. *Id.* at 107. Peerenboom fails to mention Lyotard, who, to my mind, reaches similar conclusions. For example, Lyotard does not expect any "last reconciliation between language games (which, under the name of faculties, Kant knew to be separated by a chasm)," and argues that "only the transcendental illusion (that of Hegel) can hope to totalize them into a real unity." LYOTARD, *supra* note 93, at 81. Lyotard invokes Ludwig Wittgenstein and Theodor Adorno as initiators of the postmodern reexamination of the Enlightenment. See *id.* at 73. Rorty shares an interest in the first-named. See RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 5–7 (1979).

pragmatic coherence rather than foundational correspondence, as an aesthetic rather than a logical order.²²⁶ European postmodernity turns out to be the access point to Chinese premodernity. Fragmenting our notion of the subject gets us nearer to Chinese ways of thinking, as Graham also argued:

The spontaneity of preferences changing in relative weight with expanding or contracting awareness is one of the implicit assumptions a Westerner has to make explicit in interpreting Chinese thinkers, dislodging his own very questionable preconception that as rational Ego he somehow detaches himself from his own spontaneity, watches unmoved even his own emotions, and only afterwards starts thinking.²²⁷

The Confucian gentleman developed his sensitivity to status and situation to dandified extremes: He knew, without having to formulate a rule, how his behavior had to match the circumstances, much as a Parisian exquisite, without ever having codified his fashion sense, knows exactly which cravat or periwig best suits the occasion. Daoism reacted against this “postmodern” aspect of Confucianism. Lao Zi rejected the pragmatic epistemology: The Daoist sage “by engaging in the (meditative) process of emptying, directly intuit[s] the best way to proceed.”²²⁸ There are foundational truths out there to be learned, but they can only be apprehended by special techniques of introspection.²²⁹ Rather than developing a full anarchist position, Lao Zi adopted an agnostic, garden-cultivating²³⁰ attitude to politics.²³¹ Nonetheless, Lao Zi agreed with Confucius in rejecting “rule ethics, codified laws, absolute values in favor of a context-specific solution agreeable to all.”²³²

226. PEERENBOOM, *supra* note 2, at 104. This stage of Peerenboom’s argument draws heavily on DAVID L. HALL & ROGER T. AMES, *THINKING THROUGH CONFUCIUS* (1987). Alasdair MacIntyre makes an interesting comment on this point:

David L. Hall and Roger T. Ames have argued recently that there is the sharpest of contrasts between the presuppositions of traditional Western metaphysical thinking, informed by conceptions of rational order, and those of classical Chinese thinking, informed instead by conceptions of order which they describe as aesthetic. But I do not think that I misrepresent their intention in formulating matters in this way, if I suggest that what their arguments really show is that within the Confucian mode of thinking there is no place for the classical Western contrast between the rational and the aesthetic as modes of ordering.

Alasdair MacIntyre, *Incommensurability, Truth, and the Conversation Between Confucians and Aristotelians About the Virtues*, in *CULTURE AND MODERNITY: EAST-WEST PHILOSOPHIC PERSPECTIVES*, *supra* note 15, at 104, 107.

227. A.C. Graham, *A Neglected Pre-Han Philosophical Text: Ho-Kuan-Tzu*, 52 *BULL. SCH. ORIENTAL & AFR. STUD.* 497, 512 (1989).

228. PEERENBOOM, *supra* note 2, at 177.

229. The Buddhist monk would agree with the Daoist sage on this, as on the proposition that the struggle for power and prestige at court is not the most important end in life.

230. See VOLTAIRE, *CANDIDE*, in *THE PORTABLE VOLTAIRE* 229, 328 (Ben Ray Redman ed. & Richard Aldington trans., Viking Press 1949) (1759) (“Pangloss sometimes said to Candide: ‘All events are linked up in this best of all possible worlds’ ‘Tis well said,’ replied Candide, ‘but we must cultivate our gardens.’”).

231. See PEERENBOOM, *supra* note 2, at 185–91.

232. *Id.* at 177.

The Legalists broke with the Confucian-Daoist consensus by promoting the value of rules and codes. The Qin criminal code marked the irrevocable introduction of carefully drafted rules into China, as the *Vinaya* marked the same change in India. The Huang-Lao adopted this aspect of Legalism, but diverged on the question of practical politics. The great Legalist Han Fei espoused "positive law where the ultimate authority is the word of the sovereign."²³³ Huang-Lao adoption of natural law "can be seen in part as an attempt to curtail the powers ceded a Legalist ruler."²³⁴ Huang-Lao's idea of nature paralleled the Yin Yang Five Phases school.²³⁵ Peerenboom emphasizes that the development of jurisprudence cannot be isolated from the development of science. He travels the same road as Joseph Needham, though in the opposite direction. Needham invoked the absence of European natural law to explain why Chinese natural science, despite early promise, failed to match the achievements of Chinese technology.²³⁶ Peerenboom invokes the early Chinese developments in natural science as an important influence on China's only natural law school. The critical event was that the Tian family usurped power in the state of Qi in 481 BCE: "Needing to justify their takeover, they appealed to the symbol of the Yellow Emperor, a mythic warrior who unified the empire through military conquest. In addition, they sponsored many intellectuals who gathered together at what has become known as the Jixia Academy."²³⁷ The proto-scientist Zou Yan, the founder of Yin Yang Five Phases thought, flourished at the Academy in the early third century BCE.²³⁸ Zou Yan took preexisting schemes of correlative thought (yin yang and the five phases) and reinvented them as "causal correlative cosmologies."²³⁹ This shift from a descriptive classification scheme to "a theory accounting for the actual mechanism by which things are correlated and exert influence on each other"²⁴⁰ was made possible by thinking of the natural order as rule-governed. This proto-scientific notion of rules within nature enabled the Huang-Lao meditators to discover a predetermined *dao* instead of the emergent *dao* sought by Confucius and the Daoists.²⁴¹

233. *Id.* at 140.

234. *Id.*

235. *See id.* at 227–29.

236. *See* A SELECTION FROM THE WRITINGS OF JOSEPH NEEDHAM 157, 238–41, 337–43 (Mansel Davies ed., 1990); 1 NEEDHAM, *supra* note 216, at 276–306. *Compare* DERK BODDE, CHINESE THOUGHT, SOCIETY AND SCIENCE 356–59 (1991) (arguing that aspects of Chinese language, concepts of time, organismic thinking, and ideas of government, as well as lack of idea of law of nature, hindered Chinese science), with A.C. GRAHAM, *China, Europe, and the Origins of Modern Science: Needham's The Grand Titration*, in UNREASON WITHIN REASON 137 (1992) (arguing that rise of modern European science was unique historical event, not result of fundamental differences between European and Chinese civilizations, so that question why China did not develop modern science independently is misguided).

237. PEERENBOOM, *supra* note 2, at 225.

238. *See id.* at 226.

239. *Id.* at 228.

240. *Id.*

241. *See id.* at 172.

Huang-Lao is the only school of Chinese thought whose name reflects its eclecticism. "Huang" refers to Huang Di, the Yellow Emperor, and signifies a debt both to the Jixia Academy and to Confucius.²⁴² "Lao" refers to Lao Zi and the importance of emptying meditation in revealing deep truths about the world.²⁴³ This dual heritage enabled the Huang-Lao to cope with imperial China's legitimation crisis: "With the inevitable collapse of the despotic Qin regime, the state stood in dire need of a more people oriented ideology, one capable of rebuilding the devastated economy, restoring the debilitated political structures, and regaining the lost support of the masses. Huang-Lao was just such an ideology."²⁴⁴ In practice, natural law meant the minimum necessary law. In his press release after overthrowing the Qin, the first Han emperor said:

Fathers and Elders, you have suffered long enough from the cruel laws of the [Qin] . . . I am merely going to agree with you, Fathers and Elders, upon [a code of] laws in three articles: he who kills anyone will be put to death, he who wounds anyone or robs [will be punished] according to his offence; as to the remainder, I am repealing and doing away with the laws of the [Qin].²⁴⁵

For the next sixty years, the Han Dynasty's policies were Huang-Lao policies. The Legalist idea that state law was necessary, and that it should consist of rules, survived the collapse of Qin and has been part of the Chinese synthesis ever since. Why then were the Huang-Lao chased out of their positions of influence by the Emperor Wu and Dong Zhongshu? Peerenboom suggests several possible reasons why Dong Zhongshu's mixture of Confucius and proto-science should win favor at court.²⁴⁶ For my part, I am happy to attribute it to fashion: Huang-Lao had ceased to be *le dernier cri*. What requires explanation is why Dong Zhongshu's fresh mixture of old elements, his "Neo-Confucianism," should become firmly established as the summation of classical Chinese wisdom. His role in mediating classical philosophy to later millenia can be compared with Justinian's role in mediating classical European law. Peerenboom gives the answer: "When Emperor Wu, following Dong Zhongshu's advice, established the Imperial University and examination system

242. See *id.* at 1; see also *id.* at 90 ("[T]he Yellow Emperor constituted the ideal ruler in that he had the support of the people. This is the aspect in which Huang-Lao thought most clearly reflects the positive influence of Confucianism.").

243. See *id.* at 1; see also *id.* at 176-77 (arguing that Lao Zi and Huang-Lao agreed that emptying meditation was means to harmonize moral claims of *dao*, but Lao Zi saw *dao* as emergent, while Huang-Lao saw it as predetermined).

244. *Id.* at 243.

245. *Id.* at 244 (quoting 1 PAN KU, THE HISTORY OF THE FORMER HAN DYNASTY 58 (Homer H. Dubs trans., 1938) (alterations in original)).

246. See *id.* at 251-55.

with the Confucian classics as core curriculum, the eventual victory of Confucianism was assured."²⁴⁷ Michael Walzer's interesting discussion of whether the examination system fostered a true meritocracy relates to the later centuries of its operation.²⁴⁸ The introduction of the system shows us knowledge and power in their most intimate embrace: Dong Zhongshu was engaged in a simultaneous exercise in canon formation and in the professionalization of the intellectuals. Which of the earlier attitudes to law would prevail in Dong Zhongshu's Neo-Confucianism? Though Confucius had the hypercanonical status of that-which-is-on-the-examination thrust upon him, the wisdom of a practicing bureaucrat lay elsewhere: The idea of an imperial code, its revisions, and its proclamations had become entrenched. Chinese identity, as defined by the examiners, favored the Confucian preference for virtue over rule. When Buddhism settled in China a couple of centuries later, the Neo-Confucians deployed against it an antinomianism that had become more sophisticated through debate with Huang-Lao and Legalists:

Chinese people and foreigners are naturally different, and this difference is rooted in their different natures (*xing*). Chinese people are endowed with a clear and harmonious nature, and are capable of humane sentiments and upholding correct morality; therefore Duke of Zhou and Confucius taught them the teaching of human nature and learning; foreigners are endowed with a violent nature and are greedy and full of anger; therefore Sakyamuni [the Buddha] imposed on them the discipline of the five precepts.²⁴⁹

The emperors may have deigned to give their subjects an imperial code, but students were taught to conceive of morality as an area to which rules were quite alien. At the time Buddhism was reaching China, morality was on the syllabus, while law was what you picked up on the job after you qualified. This had the effect of distinguishing law and morality more sharply than in third- and fourth-century Rome: Law (and Buddhism) dealt with rules, while morality (and the official culture) dealt with situations.

247. *Id.* at 250.

248. See MICHAEL WALZER, SPHERES OF JUSTICE 139–43 (1983).

249. Tang Yijie, *The Development of Chinese Culture: Some Comments in the Light of the Study of the Introduction of Indian Buddhism into China*, in FROM BENARES TO BEIJING: ESSAYS ON BUDDHISM AND CHINESE RELIGION IN HONOUR OF PROF. JAN YUN-HUA 261, 266 (Koichi Shinohara & Gregory S. Schopen eds., 1991) (quoting He Chengtian's *Reply to Zong Bin*). The Duke of Zhou was a historical figure admired by Confucius as a model ruler. See D.C. Lau, *Introduction to CONFUCIUS*, *supra* note 219, at 9, 17–18, 28. Richard Gombrich provides a terse formulation of the five precepts, the "primary Buddhist formulation of [the] universal morality": "[D]on't kill, don't steal, don't have wrong sex, don't lie, and don't drink, because that leads to the other four things." Richard F. Gombrich, *The Duty of a Buddhist According to the Pali Scriptures*, in THE CONCEPT OF DUTY IN SOUTH ASIA 107, 108 (Wendy Doniger O'Flaherty & J. Duncan M. Derrett eds., 1978).

C. *Comparison, Translation, and the Contingency of Metaphor*

In Peerenboom's new story, the discovery of the *Boshu* enables us to appreciate what happened during a critical period in Chinese jurisprudence. Without the Huang-Lao's development of a home-grown natural law theory, the brief experiment with empire and positive law might have been altogether discredited. By contributing to the survival of the Former Han,²⁵⁰ the Huang-Lao helped foster the growing belief that a politically unified China was more natural than a fragmented (and inevitably warring) collection of states.²⁵¹ Peerenboom's analysis of the *Boshu* tells an additional and even more interesting story about natural law as a comparative concept. God's role in European natural law is to add strength to natural law's transcendence. Natural law without God would have "transcendence of the weak sense,"²⁵² best described as "an organic or holistic natural order. There is no deity, no autochthonous supreme being, that exists apart from the natural order and imposes order on the cosmos. Dao simply is the natural order."²⁵³ This contrast is one of many, including that between unidirectional and bidirectional discovery of the moral order²⁵⁴ and between rule of law and rule of man,²⁵⁵ which Peerenboom deploys to tame the ambiguities inherent in the European use of natural law.

Carine Defoort, in an otherwise sympathetic review, refers disapprovingly to Peerenboom's "obstinate quest for clarity."²⁵⁶ She feels that he is trying, *per impossibile*, to get a sharp picture of an unfocused reality²⁵⁷ and also criticizes his attribution of transcendence to the Huang-Lao.²⁵⁸ Defoort's accusation that he is taking too much latitude in translation²⁵⁹ raises a general problem in the comparison of cultures. How do you translate a Chinese work that does not care whether its concepts are transcendental into a language like English, in which words have to be either abstract or concrete? The Chinese regard *tian* (heaven) as the source of all order. Inevitably, she concedes, we have to translate *tian* in some contexts as an abstract principle of order, in others as "the concrete sky, the weather, the day."²⁶⁰ But Peerenboom has made too much use of this opportunity: "[E]ven within one

250. The early Han rulers are known as the "Former," "Western," or "Hsi" Han.

251. See PEERENBOOM, *supra* note 2, at 247.

252. *Id.* at 83.

253. *Id.*

254. See *id.* at 176.

255. See *id.* at 171.

256. Carine Defoort, *The 'Transcendence' of Tian*, 44 PHIL. E. & W. 347, 347 (1994) (reviewing PEERENBOOM, *supra* note 2).

257. See *id.* at 348 (arguing that "a certain degree of obscurity has probably always characterized the category 'Huang-Lao'").

258. See *id.* at 352.

259. See *id.* at 354-58.

260. *Id.* at 354.

passage *tian* is alternatively translated as 'nature,' 'heaven,' 'natural order.'"²⁶¹ The result is a text that is "fluently English in language and thought. The *Boshu* writer makes perfect sense. No illegitimate jumps are made from 'is' to 'ought,' because this confusion has been taken care of in the charitable translation."²⁶²

The disagreement between Peerenboom and Defoort is restricted to whether the silk manuscripts used the word *tian* in a transcendental sense. Defoort agrees that the Huang-Lao viewed nature as "impersonal, constant, rule-governed, and normatively prior to humanity."²⁶³ This dispute over one Chinese word perfectly illustrates the problem of cross-cultural comparison.²⁶⁴ As a counter to Peerenboom's taxonomy of natural law, Defoort offers a metaphor that operates at the same fundamental level in China as does French's mandala in Tibet. To Chinese eyes, the most impressive feature of the night sky was not planetary motion or the annual round of the zodiac constellations, but the fact that everything else revolved around the Pole Star. This became their metaphor for political power—as above, so below—and the axis that joined the emperor's palace to Polaris was seen as the first and deepest cut into an undifferentiated universe.²⁶⁵ Defoort explains: "The fertile obsession in Chinese philosophy is . . . with the possibility of perfect and restless carving and with the uncarved center from which all division starts," not with "mirroring another realm."²⁶⁶ The Han philosophers found order and constancy in the night sky. In the Pole Star as the still point of a turning world, they found a metaphor for the emperor's *wu-wei* (having-no-activity).²⁶⁷ In T.S. Eliot's words, "there the dance is/But neither arrest nor movement."²⁶⁸ Peerenboom offers us a painstaking analysis of Chinese philosophical terms. Defoort offers us an insight into Chinese

261. *Id.* at 358.

262. *Id.*

263. *Id.* at 352. As Peerenboom points out, Defoort regards Huang-Lao as natural law, though of an immanent, nonfoundational variety. See R.P. Peerenboom, *The Rational American and the Inscrutable Oriental as Seen from the Perspective of a Puzzled European: A Review (and Response) in Three Stereotypes—A Reply to Carine Defoort*, 44 PHIL. E. & W. 368, 374 n.2 (1994).

264. As Ariel Glucklich has described it: "Is [understanding other cultures] the formulation of dualistic explanations, scientific theories that reduce cultural phenomena to causal principles? Or is it the empathetic but nonsystematic intuition of the hermeneutical *verstehen* [understanding]?" ARIEL GLUCKLICH, *THE SENSE OF ADHARMA* 3 (1994). Defoort, "the European/Continental philosopher . . . overly relying on the ambiguity and openness of metaphor," is Glucklich's hermeneuticist. Peerenboom, *supra* note 263, at 376 n.15. Peerenboom, whose objectionable feature is his search for clarity by way of a "Cartesian demand for perfect clarity and strictly demarcated definitive criteria," is Glucklich's dualist. *Id.* at 372.

265. The Qin emperor, for example, sponsored 12 monumental metal sculptures, which may have represented the circumpolar stars and may have been placed in 220 BCE in a temple dedicated to the imperial cult of Polaris. See Bodde, *supra* note 205, at 56 n.52.

266. Defoort, *supra* note 256, at 363.

267. See PEERENBOOM, *supra* note 2, at 181 (describing *wu-wei* as nonimpositional action, "not the imposition of a given form of behavior but rather behavior that emerges from the creative activities of persons cooperating in the pursuit of a common goal"); *id.* at 220 (noting that *wu-wei* literally means "having-no-activity" and is sometimes understood as limiting one's acts to what is necessary and natural).

268. T.S. ELIOT, *Burnt Norton*, in *FOUR QUARTETS* 13, 15 (1943).

philosophical rhetoric. She would no doubt agree with Rorty that “[i]t is pictures rather than propositions, metaphors rather than statements, which determine most of our philosophical convictions.”²⁶⁹ Were we to take one further step and expose the dominant metaphor as contingent, we would have arrived by another route at postmodernism’s central concern. As it happens, the Pole Star metaphor *is* geographically contingent. Though mapped directly onto the night sky, it is merely local knowledge: Only if you live north of the Tropics does the night sky orbit the Pole Star. Seen from within the Tropics, from Java or Sri Lanka for instance, the night sky tells a linear “up and over” narrative instead.²⁷⁰

IV. COMPARING CULTURES: WHY, HOW, AND WHICH?

Thus far we have given separate consideration to French’s account of Tibetan legal culture and Peerenboom’s reading of early Chinese legal history. Now let us begin to think of them together. I believe we can learn more from them together than we can from each apart, because I regard the comparative method as a useful tool for generating new understandings of disparate cultures. Twenty years ago this would have been a truism. Now it has to be defended against the postmodern proposition that cultures can be so different as to be incommensurable. I shall argue for an alternative postmodern approach that sees comparison as an area of conversation, a discourse, rather than a discipline. First, however, I must be explicit about the kind of comparison I propose.

The law texts of the Dalai Lama’s Tibet and Han China were addressed to two audiences. They were copied, discussed, and annotated by a narrow group of specialists who had not yet developed into a legal profession. And they addressed a wider audience of peasants, farmers, merchants, and soldiers. The available evidence suggests that the latter audience did not share all of the specialists’ attitudes to law: The narrow legal culture was too technical to be adopted wholesale as the wide legal culture of the illiterate or semiliterate peasantry. In comparing Tibet and China, I suggest we limit ourselves to the beliefs of the literate specialists. The legitimation problem (the degree to which narrow and wide legal culture overlapped) is best left to general historians who are able to draw on a much wider range of evidence. The narrow legal culture justified the shape, content, and existence of law primarily by invoking the authority of the past. Such claims invoking the past lead us back inexorably to the earliest law texts within each tradition. We have to use the genealogical method (which means tracing the themes of each tradition back to their earliest textual appearance) in order to evaluate these claims. Tibetan law justified

269. RORTY, *supra* note 225, at 12.

270. See ANTHONY F. AVENI, *EMPIRES OF TIME: CALENDARS, CLOCKS AND CULTURES* 294–95 (1989)

itself as Buddhist law. Was this true? In Part II, I showed that the legal culture of the Dalai Lama's Tibet was a manifestation of a written legal tradition as old as China's. The legal literature discussed by French used themes, stories, genres, and ethical *topoi* (rhetorical commonplaces) that were written down by Buddhists in India in the first century BCE and were first composed up to four centuries earlier. French has described the final flowering of 2500 years of Buddhist law. Peerenboom has described the earliest phases of the equally venerable Chinese legal tradition. I want to compare these traditions, with particular emphasis on the choices that were made at the birth of Buddhist and Chinese legal literature.

Were I using the formal disciplinary language of comparative law, I would propose that Buddhist law and Chinese law constitute a new field of research on which sophisticated comparative techniques can be deployed in expectation of rich results. But I have been scared off such bombastic language by the postmodern analysis of disciplinary truth claims. Comparative lawyers, impressed by the universality of their subject matter as compared with that of the "simple technicians of the national law,"²⁷¹ claim social scientific status for their discipline. Yet too often the rules they compare have been wrenched from legal textbooks regardless of context. In Pierre Legrand's words, students of comparative law "forget about the historical, social, economic, political, cultural, and psychological context which has made that rule or proposition what it is."²⁷² The work of such nineteenth-century pioneers as Henry Maine and Karl Marx is so much richer than contemporary efforts that it seems to come from another discipline;²⁷³ perhaps the term "comparative law" is now so tainted that we should refer to context-rich comparative studies as a quite different discipline—as "legal cosmology"²⁷⁴ perhaps, or as "comparative legal cultures."²⁷⁵ The arbitrary data manipulated by contemporary comparativists do not yield fruitful results. More worryingly, comparative law's practitioners have hardly considered what should count as a fruitful result of comparative research. In my view, the conclusions of a typical comparative law project are prefigured by the researcher's choice of what to compare. While a comparison of chalk with cheese must necessarily highlight

271. Pierre Legrand, *How to Compare Now*, 16 *LEGAL STUD.* 232, 235 (1996). Legrand notes "that comparative work suggests an expanded intellectual range, if not erudition." *Id.* at 234.

272. *Id.* at 236.

273. See Bernard Rudden, *Comparative Law in England*, in *COMPARATIVE LAW AND LEGAL SYSTEM: HISTORICAL AND SOCIO-LEGAL PERSPECTIVES* 79, 87 (W.E. Butler & V.N. Kudriavtsev eds., 1985) ("The earlier scholars such as C. Butler, Maine, and Maitland were primarily interested in comparative legal history.").

274. FRENCH, *supra* note 1, at 59.

275. Csaba Varga, *Introduction to COMPARATIVE LEGAL CULTURES* at xv, xix (Csaba Varga ed., 1992); see also Friedman, *supra* note 6, at 52 (arguing that "comparative legal culture" should replace "traditional comparative law"); Volkmar Gessner, *Global Legal Interaction and Legal Cultures*, 7 *RATIO JURIS* 132, 133 (1994) (arguing that structural approach to sociology of law should be supplemented with "comparison of legal cultures").

the question of edibility, a comparison of chalk with marker pens will focus on legibility. Likewise we know, even before we begin the research, that a comparison of the law relating to road traffic accidents in Connecticut and France will highlight macroeconomic questions about loss shifting and transaction costs, while the same comparison between Connecticut and England will highlight the role of the jury in tort trials.

Rather than claiming that comparison can produce objectively verifiable results, we should regard the comparative method as fruitful when it increases our understanding of the objects compared. Ideally we should achieve a better understanding of both chalk and cheese, but usually we use the "foreign" legal system to generate a fresh understanding of our local legal tradition. Comparison becomes a device to make the familiar seem strange.²⁷⁶ The foreign culture gives us a sharper sense of the unfamiliar paths that our legal culture might have taken. Using foreign cultures this way is connected to other tropes that invoke chalk for the better understanding of cheese. Metaphor is the least formal of these, being fast and allusive where comparison is pedestrian and exhaustive. A more formal trope was the eighteenth-century penchant for ventriloquizing one's comments on local customs into the mouth of an outsider.²⁷⁷ Like metaphors and like eighteenth-century social comment, the comparative method must be judged by whether it works to increase the reader's understanding, rather than by whether it is true or false.

My strictures on comparative law strike a postmodern note. Since there are so many varieties of postmodernism, I must explain which note I have tried to hit. I am more interested in the epistemological tendency within postmodernism (which concerns itself with the truth claims of academic disciplines) than with the aesthetic wing (which promotes pastiche in the arts). Among the epistemologists, it is Lyotard and Rorty who have helped me understand the understanding of law.²⁷⁸ This Neo-Pragmatic tendency

276. Such a use of comparison is an answer to Robert Burns's prayer: "O wad some Power the gifte gie us/To see oursels as ithers see us!" ROBERT BURNS, *To a Louse: On Seeing One on a Lady's Bonnet at Church*, in THE COMPLETE POETICAL WORKS OF ROBERT BURNS 43, 44 (1912) Rudyard Kipling similarly asked the rhetorical question, "And what should they know of England who only England know?" RUDYARD KIPLING, *The English Flag*, in SELECTED PROSE & POETRY OF RUDYARD KIPLING 23, 23 (1937).

277. This *topos* was connected with universal, natural law truths: "The device of portraying one's own civilization through the eyes of others ([Oliver] Goldsmith's Chinese, [Baron Charles de] Montesquieu's Persians . . . and Voltaire's traveller from Sirius) was associated with the belief that there was a true standard for all humanity and that the civilization in question was contrary to nature." LESZEK KOLAKOWSKI, MAIN CURRENTS OF MARXISM 40 (P.S. Falla trans., 1978).

278. Two articles define the common ground and the differences between Rorty and Lyotard particularly well. See Richard Rorty, *Habermas and Lyotard on Postmodernity*, in ZEITGEIST IN BABEL: THE POSTMODERNIST CONTROVERSY 84 (Ingeborg Hoesterey ed., 1991); Willem van Reijen & Dick Veerman, *An Interview with Jean-François Lyotard*, 5 THEORY CULTURE & SOC'Y 277 (Roy Boyne trans., 1988). In the former, Rorty attempts "to split the difference between Lyotard and [Jurgen] Habermas." Rorty, *supra*, at 95. Rorty accepts "Lyotard's postmodernist 'incredulity towards metanarratives,'" *id.*, but excoriates Lyotard's avant-gardeism: "The attempt of leftist intellectuals to pretend that the avant-garde is serving the wretched of the earth by fighting free of the merely beautiful is a hopeless attempt to make the special needs of the intellectual and the social needs of his community coincide," *id.* In the latter article, Lyotard accepts that "Rorty's thesis of generalized interlocution can avail itself of a rationalism, which

presents a history of European high culture from Immanuel Kant to Hans-Georg Gadamer. Near the start of modernism, Kant provided three separate critiques of how we pursue truth, goodness, and beauty. In relation to Kant, postmodernism raises the trinitarian question: Are the mental faculties involved in these pursuits three aspects of a united self, or three separate selves?²⁷⁹ More recently, Gadamer has sought to bolster European understanding by appealing to European tradition; he reassures us that our philosophical conclusions are correct within the limitations of our intellectual history.²⁸⁰ In relation to Gadamer, postmodernism is the process by which we get used to the idea that the European philosophical tradition is merely local knowledge, that Plato and all his interpreters constitute just another folk-philosophical tradition. Postmodernism complains that our philosophical understanding of the world has failed to progress, even as technology moved from steam power to the silicon chip and as financiers moved from the trading mechanisms of the East India Company to those of the global electronic market. European philosophy has gotten stuck because it has demanded the impossible. We not only want to know the right answer; we crave guarantees of rectitude, reassurances that this alone, and no other possible answer, is universally correct. David Hall refers to this as our "disease of 'metamentality.'"²⁸¹ He explains: "One of the surest signs of [the crisis of the modern age] lies in the fact that we have developed a rabid (cultural) self-consciousness that has forced us above first-intentional considerations to the level of metatheoretical endeavors."²⁸² Rorty's aim has been to deflate the metatheoretical pretensions of European philosophy, while Lyotard has targeted those accounts of history that stress teleology or structure, the grand narratives of Giovanni Battista Vico, Georg Wilhelm Friedrich Hegel, and Marx. Between them, Rorty and Lyotard have undermined the foundations on which epistemology, history, and social science have sought to rest their truth claims.

Postmodernism has as yet had less impact on law than on other disciplines. This is because the European legal tradition relinquished its foundational claims at the beginning of the nineteenth century. For two thousand years,

I would say is neither bourgeois North American . . . nor anaemic, but of a rationalism conscious of that which comprises what is absolutely discussable.'" van Reijen & Veerman, *supra*, at 304 (quoting Lyotard). Rorty is misled, however, in thinking he can get the essential on the cheap by carrying the pragmatic relationship to a transcendental level: "It is as if the *I/you* relationship marked by the exchangeability of letters between persons or empirical individuals were a transcendental condition of philosophy, of history, of progress, of Enlightenment, in short of those things that he is concerned with (and I am certainly not scornful of them).'" *Id.* at 306 (quoting Lyotard).

279. See Dick Veerman, *Introduction to Lyotard*, 5 THEORY CULTURE & SOC'Y 271, 273-74 (1988) (arguing that Kant addressed nature of thinking, doing, and feeling and tried to bridge gap between them, but Lyotard concludes they are incommensurable).

280. See HANS-GEORG GADAMER, *TRUTH AND METHOD* (Joel Weinsheimer & Donald G. Marshall trans., Crossroad, 2d rev. ed. 1989) (1960).

281. David L. Hall, *Modern China and the Postmodern West*, in CULTURE AND MODERNITY: EAST-WEST PHILOSOPHIC PERSPECTIVES, *supra* note 15, at 50, 54.

282. *Id.*

natural lawyers had attempted to ground law in some metaphysical, religious, or rational truth. In their hostility to natural law, such disparate lawyers as Jeremy Bentham,²⁸³ Maine, and Marx were united. Once law is viewed as an emanation of the nation state (whether as the command of a positivist sovereign, as the expression of freely contracting citizens, or as the will of the dominant class), it cannot claim to be any more than local knowledge. Since the early nineteenth century (when our discipline took this nationalistic turn), we have learned simply to accept, for example, that common law and civil law conceptions of ownership start from different premises.²⁸⁴ We would not now waste time arguing that one is true and the other false, particularly since we know that the two systems tend to produce convergent answers to practical problems.²⁸⁵ Since the early nineteenth century, law, unlike other disciplines, has had to accept less ambitious truth claims for itself. Hence postmodernists can describe contemporary law as "the quintessentially postmodern form of social knowledge—explicitly constructed . . . transient and disposable . . . and highly localised."²⁸⁶

By reducing everything to hermeneutics (to the nature of human understanding rather than to objective truth), postmodernism strips comparative law of any pretensions it had to social scientific status. Does it also deny that the comparative method can ever generate fresh cultural understanding? Lyotard takes this further step by claiming that individual intellectual traditions are incommensurable with each other: There is no common scale of measurement by which they can be weighed and evaluated.²⁸⁷ Traditions may or may not be mutually incomprehensible; what is important to Lyotard (because it guarantees a plethora of culturally autonomous zones) is that one tradition cannot pass judgment on another. Thus physicists, moral philosophers, and critics belong to incommensurable traditions, even if they have all been educated at French universities. So do such socially marginalized groups as the redundant steel workers of Lille or the North African immigrants of the Paris suburbs. In the background looms Lyotard's paradigm case of the incommensurability of traditions: Asia versus Europe.²⁸⁸ If Asian legal

283. Jeremy Bentham (1748–1832) was a pioneer of legal positivism, a popularizer of utilitarianism, and a law reformer.

284. See F.H. Lawson, *Common Law*, in 6 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: PROPERTY AND TRUST ch. 2, at 22, 24 (Frederick H. Lawson ed., 1975).

285. See *id.* at 22; F.H. Lawson, *Comparative Conclusion*, in 6 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: PROPERTY AND TRUST, *supra* note 284, ch. 2 at 137, 141.

286. ROGER COTTERRELL, *THE SOCIOLOGY OF LAW* 308 (2d ed. 1992).

287. How Lyotard's incommensurability thesis relates to other postmodernisms (including those of Rorty, Derrida, Michel Foucault, and Pierre Bourdieu) is carefully and critically examined in MCGOWAN, *supra* note 13, at 180–210. Anglophone views on incommensurability (as espoused by Kuhn, Rorty, and MacIntyre) are discussed in Richard J. Bernstein, *Incommensurability and Otherness Revisited*, in *CULTURE AND MODERNITY: EAST-WEST PHILOSOPHIC PERSPECTIVES*, *supra* note 15, at 85, 87–93.

288. See MCGOWAN, *supra* note 13, at 188 (arguing that Lyotard's incommensurability oscillates between, at one extreme, "an endless proliferation of 'private languages'" and, at the other, "some fundamental East/West distinction").

traditions, such as the Tibetan and the Han Chinese, are incommensurable with the traditions of American legal scholarship, then French and Peerenboom have attempted the impossible, and this Review can only judge the distance by which French and Peerenboom have failed. If Lyotard is right, we can only compare different traditions by comparing degrees of incomparability.

Rorty is more optimistic about our attempts to cross the incommensurability barrier: "If there is no such common ground, all we can do is . . . be hermeneutic about the opposition—trying to show how the odd or paradoxical or offensive things they say hang together with the rest of what they want to say, and how what they say looks when put in our own alternative idiom."²⁸⁹ "[D]espite his reliance on the term," argues McGowan, "Rorty chooses not to take incommensurability very seriously."²⁹⁰ Indeed, Rorty's favored niche for contemporary philosophers is as *contrabandistas* smuggling understanding across the incommensurability frontier. The metaphor he uses is more law-abiding and philanthropic. He likens the hermeneutic philosopher to the ideal host of a campus cocktail party. Because I find this metaphor extremely helpful in understanding the comparative method, I shall quote it at length and elaborate it further:

I think that the view that epistemology, or some suitable successor-discipline, is necessary to culture confuses two roles which the philosopher might play. The first is that of the informed dilettante, the polypragmatic, Socratic intermediary between various discourses. . . . The second role is that of the cultural overseer who knows everyone's common ground—the Platonic philosopher-king who knows what everybody else is really doing whether *they* know it or not, because he knows about the ultimate context (the Forms, the Mind, Language) within which they are doing it. The first role is appropriate to hermeneutics, the second to epistemology.²⁹¹

The message, for Rorty's fellow philosophers, is that in mixed disciplinary company they are to mingle with historians, literary critics, and sociologists as if on equal terms. They should join in the general conversation, offer the drinks around, and be nice to the other guests.²⁹² They should not treat the gathering as a lecture on, or trial of, the pretensions of other disciplines: At Rorty's party there are no podia, no seats of judgment, but only a commitment to keeping conversation alive. This image of intellectual life as an endless

289. RORTY, *supra* note 225, at 364–65.

290. MCGOWAN, *supra* note 13, at 195.

291. RORTY, *supra* note 225, at 317–18.

292. MacIntyre objects: "[I]f I am doomed to spending the rest of my life talking with literary critics and sociologists and historians and physicists, I am going to have to listen to a great deal of philosophy, much of it inept." Alasdair MacIntyre, *Alasdair MacIntyre on the Claims of Philosophy*, LONDON REV. BOOKS, June 5–18, 1980, at 15 (reviewing, *inter alia*, RORTY, *supra* note 225). We lawyers, who have had to listen to philosophers spouting inept law, may raise an eyebrow at this.

party in which specially trained hosts ("informed dilettantes") charm the guests out of their seclusion is attractive, as Lyotard himself recognizes.²⁹³ Since the more enjoyable campus parties have guests from different cultures as well as from different disciplines, it is an image that can be adapted to cross-cultural understanding. Rorty's Socratic, polypragmatic hosts are adept at smoothing over interdisciplinary problems. To ensure that the conversation flows between Tibetans, Americans, and Chinese, we need Heroditan, polyglot hosts—in short, comparativists such as French and Peerenboom. The comparative method is nothing more than the empathetic good manners that foster cross-cultural conversations at Rorty's party: "Hermeneutics sees the relations between various discourses as those of strands in a possible conversation, a conversation which presupposes no disciplinary matrix which unites the speakers, but where the hope of agreement is never lost so long the conversation lasts."²⁹⁴

Rorty has made attendance at his party conditional on two rules. We shall not be his welcome guests unless we forbear from saying, "I'm right—you're wrong," and, "Oh, I see—when you say X, you really mean Y."²⁹⁵ He designed these rules in order to prevent disciplines from jockeying for status and prestige, but they are equally effective in preventing the weeds of ethnocentricity from clogging cross-cultural channels of communication. To say, "I'm right—you're wrong," is to assume that our local definition of law and its sources applies around the world. Legal anthropology has learned to avoid this mistake,²⁹⁶ but only over the last fifty years. To find unself-conscious assumptions of the superiority of European definitions of law we need only go back to the colonial law reports.²⁹⁷ To respond, "When you say

293. Lyotard commented:

Let us go back to my relation with Rorty. There is something very powerful, but sophisticated, in his rhetoric. He says, "we should drop all foundationalism, as it is put in the United States; it is without interest since it is indecidable. Only one thing is decidable, that is whether we do or do not speak together."

van Reijen & Veerman, *supra* note 278, at 304 (quoting Lyotard).

294. RORTY, *supra* note 225, at 318.

295. In Rorty's own words:

For hermeneutics, to be rational is to be willing to refrain from epistemology—from thinking that there is a special set of terms in which all contributions to the conversation should be put—and to be willing to pick up the jargon of the interlocutor rather than translating it into one's own.

Id. Bernstein gives the same advice in the opposite order:

We must [listen carefully to alien traditions] in such a way that we resist the dual temptations of *either* facily assimilating what others are saying to our own categories and language without doing justice to what is genuinely different and may be incommensurable *or* simply dismissing what the "other" is saying as incoherent nonsense.

Bernstein, *supra* note 287, at 93.

296. See, e.g., Rebecca Redwood French, *Law and Anthropology*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY*, *supra* note 60, at 397, 398 (noting that legal anthropology's "companion[s] between legal systems are contextually situated and attempt to avoid normative judgments . . . [and] often do not employ Anglo-American jurisprudential categories or legal systems as their basis for companion")

297. A particularly ripe example from 1920s Burma is described in Hla Aung, *The Judicial Policy of the British Colonial Government in Burma*, *GUARDIAN* (Rangoon), May 1967, at 42, 43. The Indian

X, you really mean Y," is to force interlocutors to use your own terms. It is an act of cruelty, albeit often well-intentioned cruelty. The virtuous wish to present exotic material for popular consumption leads to the vice of mistranslating dharma as "law" or *li* as "custom." At the more subtle level debated by Peerenboom and Defoort, this becomes the vice of presenting what is vague and implicit in the original text as clear and explicit in translation. As long as we follow Rorty's rules of etiquette, we can keep the cross-cultural conversation going. As long as the Sino-American conversation continues, the spectre of incommensurability between Chinese and American traditions is held at bay. Such are the truth claims of postmodern comparative law: A cross-cultural comparison is good if it stimulates the conversation, bad if it empties the room.

I am proposing that *The Golden Yoke* and *Law and Morality in Ancient China* enable a stimulating comparison between Buddhist and Chinese legal traditions. What common ground do we have to help get this conversation started? We can point out that Buddhist and Chinese legal traditions are equally old, dating to the last five centuries BCE. We can note that in both cultures legal literature means not just written rules such as the *Vinaya* and the Qin Emperor's code, but also written polemics pro and contra the process of writing rules down. In China and India, jurisprudential debate and written law are of equal age. We could attempt to ascertain whether Indian and Chinese processes were independent of each other.²⁹⁸ We could ask whether common factors were simultaneously at work in North India and North China: Did urbanization have to reach a critical mass? Or did literacy have to spread from the governing elite down to the market traders? Had improved bronze technology led to a greater agricultural surplus or made the army more effective as a centralizing force? Such questions are very much to my taste, but it may be that, if we accept Lyotard's strictures against grand narrative, we are no longer allowed to discuss them. A scheme of human history that is broad enough to be applicable globally may be deemed too ambitious. If Marxism is the grandest of the grand Enlightenment narratives, can we still tell the story that goes: "Once upon a time humanity lived by hunting and foraging, then they invented settled agriculture, then they stumbled into the Industrial Revolution"?²⁹⁹ Our cross-cultural conversation will grind to a halt unless we

Contract Act invalidated contracts that were contrary to the laws. Although the *Vinaya* forbade conveyances from laymen to monks, a British court in 1929 held that laws were rules of civil conduct enforced by the state and, since the rules of the *Vinaya* were not enforced by the state, they were not laws in the proper juridical sense of the word. See *U Pyinnya v. Maung Law*, I.L.R. 7 (Rangoon) 677 (Rangoon H.C. 1929) (Full Bench).

298. On current knowledge, we can rule out diffusion, since the direct trade between India and China started no earlier than the last century BCE. See Andrew Huxley, *The Reception of Buddhist Law in S.E. Asia 200 BCE-1860 CE*, in *LA RÉCEPTION DES SYSTÈMES JURIDIQUES* 139, 151 (Michel Doucet & Jacques Vanderlinden eds., 1994).

299. If we think the long haul from *homo habilis* to the agricultural empires of the fertile crescent needs to be distinguished from the age of writing, religion, and rice, then we shall have to distinguish

can situate India and China within a common developmental schema. We need a frame of reference within which, for example, we can understand the Qin Emperor and King Asoka as facing commensurate challenges. Will postmodernism allow us a frame of reference? Ernest Gellner's *Plough, Sword and Book*³⁰⁰ provides reassurance that big historical schemas can be successfully postmodernized. Gellner retells Marx's schema of the stages of production as a story about changes in cognition and legitimation. The success of his account suggests that we can retain a global historical schema, as long as we jettison Marx's simplistic picture of economic base determining ideological superstructure. Gellner unravels the complex links between base and superstructure. To mention only those that are most relevant to the birth of written law, agriculture and the spread of literacy produced new job opportunities for soldiers and priests. These soldiers and priests then had to create ideologies in order to make themselves indispensable; they safeguarded their new jobs by developing new services, writing new texts, and establishing new areas of expertise.³⁰¹ Lawyers can be seen as a branch of Gellner's "clerisy," and written law as part of the legitimating "doctrine" enunciated by the clerisy.³⁰²

Our comparative conversation about the birth of Chinese and Buddhist legal literature can proceed as a series of thought-experiments in which we examine each factor in turn, while holding the other factors as constant. Treating urbanization as the variable, for example, we can ask whether the differential growth of cities in India and China affected the processes of state formation and the attitudes to law. Postmodernism emphasizes one variable in particular, that of language. What we say is shaped and constrained by the language in which we say it. Gadamer links European philosophy with Indo-European grammatical structure by asking: "Even before the game of world history began, did some cast of the dice fatally compel us by means of our language to our way of thinking . . . ?"³⁰³ How could we talk about the world in a language whose grammar was not analyzable into "the language of metaphysics with whose categories we are familiar from grammar—subject and predicate, nomen and verbum, noun and verb"?³⁰⁴ Gadamer's rhetorical questions can only be answered if postmodernists are prepared to compare the European intellectual tradition with the philosophical literature of non-Indo-European languages. Chad Hansen is engaged in precisely this kind of thought-

premodernity (the age of hunter-gatherers) from *postpremodernity* (the age of settled agriculture). Cf. 1 MARSHALL S. HODGSON, *THE VENTURE OF ISLAM* 109 n.3 (1974) (insisting on "the startling historical contrast between conditions before and after the development of citied and lettered life" in agrarian civilizations).

300. ERNEST GELLNER, *PLOUGH, SWORD AND BOOK: THE STRUCTURE OF HUMAN HISTORY* (1988)

301. *See id.* at 21–23, 275–76.

302. *Id.* at 73–74.

303. GADAMER, *supra* note 280, at 545.

304. *Id.*

provoking work. In a tonal language such as Chinese,³⁰⁵ he explains, words may act as nouns, verbs, or adjectives depending on context.³⁰⁶ This, coupled with noninflected grammar, focuses attention away from the subject and predicate sentence onto the phrase:

These observations about the differences between Chinese and English syntax explain (from a Chinese point of view) why we place so much emphasis on the sentence, or (from our point of view) why Chinese philosophers do not. Either of two morals can be drawn: Chinese thinkers have a blind spot or we have an obsession.³⁰⁷

Hansen concludes that for a Chinese gentleman of the Han Dynasty or earlier, knowledge meant pragmatics—knowing how to—rather than semantics—knowing that.³⁰⁸ This is fundamental to the understanding of early Chinese texts, but Hansen does not find a full-blown Lyotardian incommensurability between Indo-European and Sinic languages. He shows that concepts originating and readily expressible in Indo-European tongues can also be expressed in Chinese.³⁰⁹ The examples he gives are drawn from the Chinese reception of Buddhism. Buddhist analysis, translated from the Indo-European languages of Sanskrit and Pali, smuggled Aryan understandings of language, truth, and law into the thinking of India's eastern and northern neighbors.³¹⁰ The unstable boundary between West and East shifted once again.

Without Hansen's comparative philosophy, Gadamer's dark suspicion that language constrains philosophical analysis would have remained untested. Without the comparative method, postmodern analysis is doomed to inhabit a world of unique singularities. Lyotard and Rorty have produced sophisticated accounts of the last two centuries of European intellectual life. Because the industrial revolution was *sui generis*, they had no need of comparison. As postmodernism looks back beyond the eighteenth century to examine the premodern roots of European modernity, it engages with topics as to which

305. Tibetan and Burmese are also tonal. See Scott DeLancey, *Sino-Tibetan Languages: Introduction*, in *THE WORLD'S MAJOR LANGUAGES* 799, 805–06 (Bernard Comrie ed., 1987); Julian K. Wheatley, *Burmese*, in *THE WORLD'S MAJOR LANGUAGES*, *supra*, at 834, 842.

306. See Chad Hansen, *Chinese Language, Chinese Philosophy, and "Truth"*, 44 *J. ASIAN STUD.* 491, 498–500 (1985).

307. *Id.* at 500. Notice Hansen's scrupulous concern not to choose between the Chinese speaker's and the English speaker's comparison. Contrast MacIntyre's dictum—"The key to comparative studies is the comparison of comparisons," MacIntyre, *supra* note 226, at 121—which suggests that an extra nugget of information can be derived by comparing the blind spot with the obsession.

308. See Hansen, *supra* note 306, at 493. Karl Potter makes a similar claim about Indian philosophical language. See Karl H. Potter, *The Commensurability of Indian Epistemological Theories*, in *CULTURE AND MODERNITY: EAST-WEST PHILOSOPHIC PERSPECTIVES*, *supra* note 15, at 123, 124. Because most Indian philosophy was written in Indo-European languages, there seem also to be nonlinguistic factors that push towards pragmatism.

309. See Hansen, *supra* note 306, at 504.

310. For the influence of Buddhist ontological prejudice on Chinese semantic theory, see *id.* at 504, 508. For the suggestion that Buddhist "dharma" affected the meaning of "fa," see Chad Hansen, *Fa (Standards: Laws) and Meaning Changes in Chinese Philosophy*, 44 *PHIL. E. & W.* 435, 481 n.5 (1994).

comparison is both possible and desirable. Derrida has examined the history of European writing and the techniques (such as canonicity and the ascription of authority to an author) by which texts are imbued with power.³¹¹ India and China have literary traditions that are at least as old as Europe's; Indian and Chinese intellectuals dealt with similar problems of power and authority. Postmodernists who plead incommensurability as an excuse not to join this comparative conversation may be suspected of ethnocentric arrogance.

My suggestion that postmodernists should make more use of the literate traditions of Asia cuts both ways: We who work on Asian cultures should pay more attention to parallels with the European tradition and to our own European disciplinary assumptions. This has a very specific bearing on my proposal that we use *The Golden Yoke* and *Law and Morality in Ancient China* to compare the emergence of written law in the Buddhist and Chinese traditions. I suggested above that comparative legal research usually used the "foreign" legal system to generate a better understanding of the local system. Postmodern analysis shows this to be inevitable: The familiar tradition within which we were trained defines what we mean by "understanding." French, Peerenboom, and I practice in a legal tradition that had its origins in Republican Rome. If we are to prevent the terms and assumptions of this legal tradition from contaminating our analysis, we must explicitly include it in our comparison. Most readers will be familiar with the origins of written European law, so I need only give a reminder of the state of the Romanist's art.

The earliest surviving traces of written Roman law are the archaic fragments of the Twelve Tables (approximately 450 BCE).³¹² A thousand years later came the compilation of Justinian's *Corpus Iuris Civilis* (530 CE), the most important of surviving Roman law texts.³¹³ Within this millenium, the most interesting period for our purposes lies between Rome's establishing de facto dominance in the eastern Mediterranean in 188 BCE and Rome's instituting a de jure empire over the region in 31 BCE.³¹⁴ Roman law was organized into literary genres by a succession of praetors holding office during the second century BCE, by Quintus Mucius Scaevola (assassinated 82 BCE), "the first man to produce a general compendium of the civil law by arranging it into eighteen books,"³¹⁵ and by Servius Sulpicius Rufus (consul in 51

311. See JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press 1976) (1967).

312. See STEIN, *supra* note 133, at 7.

313. See DONALD R. KELLEY, *THE HUMAN MEASURE* 53–56 (1990).

314. See *THE TIMES ATLAS OF WORLD HISTORY* 77 (Geoffrey Barraclough ed., rev. ed. 1984) (noting that Rome won effective domination over eastern Mediterranean in 188 BCE, but "[i]t was only after the defeat of Cleopatra VII . . . at the naval battle of Actium in 31 BC[E], that Rome legally as well as effectively held the whole of Alexander's heritage in her hand").

315. 1 *THE DIGEST OF JUSTINIAN* 9 (Theodor Mommsen et al. eds. & G.E.M. de Ste. Croix et al. trans., 1985) (translation of DIG. 1.1.2.2 Pomponius, *Liber Singulari Enchiridii*) (written about 150 CE)

BCE), who "left almost one hundred eighty books."³¹⁶ But it was the lawyers of the classical period (100–250 CE) who reaped all the credit. Methodically, succinctly, sometimes pompously, the classical lawyers worked through every hypothetical debating point and exhausted every possible category. Classical they may have been; innovators they were not. The European tradition of written law was created by the lawyers of the later Republic. It was they who bequeathed the genres, the style of disputation, and the rhetoric of authoritative pronouncement to the classical lawyers and, via a long chain of *Digests*, *Glosses*, *Commentaries*, *Institutes*, and *Manuals*, to us.³¹⁷ It is they who must be compared with the compilers of the *Vinayapali*, the *Boshu*, the *Han Fei Zi*, and the legal codes of the Qin and the Han.

These crucial Roman developments happened about a century after the legal innovations of the Qin. I suspect that the important Buddhist legal developments were even earlier, but the dating of the *Vinayapali* is not yet firmly established.³¹⁸ To say that Rome trailed behind India and China is to speak solely of written legal rules. In China and India, jurisprudential debate and written law developed together, but the Roman jurists were notoriously reluctant to discuss legal theory. To find the Roman equivalent of the jurisprudential discussions in the *Boshu* and the *Bhaddali sutta*, we must read the orator, politician, and philosopher Cicero (106–43 BCE). He provided our only full-length Latin exposition of the links between written law, natural science, and ethical duty.³¹⁹ For good measure, he added a discussion of the legal specialisms and the direction that further professionalization ought to take. Yet Romanists treat him with scorn: "Well may we complain of the fate which has preserved so utterly worthless a work as Cicero's *De legibus*, but has allowed [Scaevola's *Ius civile*,] the book which laid the foundations not merely of Roman, but of European, jurisprudence to perish."³²⁰ Cicero is indicted on two counts: that his philosophy is an unoriginal reworking of Hellenistic sources (mainly Stoic, but also Aristotelian and Epicurian) and that, having received the best juristic education available in Rome, he wasted it by

316. *Id.* If Pomponius, our main source for early Roman legal developments, had told us the sources on which he drew, we might view his account less suspiciously. As things stand, his is the only game in town; if we reject his account of the period, we have no other.

317. See generally KELLEY, *supra* note 313 (tracing idea of law from ancient Greece to present century); STEIN, *supra* note 133 (describing juristic rules of Roman law and tracing their development in medieval and Renaissance civil law).

318. The Buddha formulated the *Patimokkha* rules around the time of the Twelve Tables, but the *Patimokkha* must have remained an oral text for centuries thereafter. It is the 1500 pages of the *Vinayapali* that have influenced all subsequent Buddhist legal genres. There is no consensus as to when this text was brought together; I favor the second or third century BCE.

319. See Ernst Levy, *Natural Law in Roman Thought*, 15 *STUDIA ET DOCUMENTA HISTORIAE ET IURIS* 1, 2 (1949) ("Cicero holds an outstanding position in the field [of Roman natural law theory]. Greatly impressed with the doctrines of the Greeks, especially Aristotle and the Stoics, and brought up in the milieu of the schools of the rhetors, he became acquainted early with the subject of natural law.") (footnotes omitted).

320. FRITZ SCHULZ, *HISTORY OF ROMAN LEGAL SCIENCE* 94 (1946).

becoming a courtroom orator. Cicero is probably guilty on the first count, but this cannot be conclusively proven, since the works he allegedly plagiarized have not survived. The jurisprudential texts of Hellenistic philosophy are in fragments, many of them preserved by Cicero himself. If I could wish for the magical reappearance, *Boshu* style, of any one classical law text, I would rather have one of these Greek works—Zeno's *On Law* perhaps, or a collection of the Stoic ethical casuistry known as "*parainetikos kai hypothetikos topos*"³²¹—than Scaevola's attempts to reorganize the civil law. On the second count, Cicero is guilty as charged, but the offense is anachronistic: The assumption that pleaders (those who establish the facts of the case) are inferior to lawyers (those who establish the norms that govern it) developed long after Cicero's time. Cicero's jurisprudential works complicate our attempts to establish a relative chronology for the emergence of Eurasian written law. Scaevola's rules and Cicero's jurisprudence were both written in Latin between 100 and 43 BCE. We are certain that Scaevola's work was original, but we are fairly sure that Cicero was influenced by an earlier literature written in Greek. European jurisprudence, it would appear, is older than European rule books. The Roman authors of rule books are admired for their methodical disciplinary approach. How much of this Roman legal science was derived from Greek philosophy? Putting the question in a general enough form to apply to Buddhism and China, how important is philosophy's role as midwife to the birth of written law?

Rhetoric geared to courtroom oratory was one of the most prominent Hellenistic sciences,³²² and Cicero admitted Stoic influence on his philosophy of law. Was Stoic dialectics³²³ responsible for creating what Europeans call legal science? Classicists have labored mightily to solve this "great controversy as to the extent of Greek influence on late Republican jurisprudence."³²⁴ On

321. 2 SEXTUS EMPIRICUS: AGAINST THE LOGICIANS 6 (R.G. Bury trans., 1935). The phrase by which this school is known may mean "branches of Ethics, such as the hortatory and admonitory," *id.* at 7, but "*hypothetikos*" might be translatable in this context as "hypothetical" rather than "hortatory," see HENRY GEORGE LIDDELL & ROBERT SCOTT, A GREEK-ENGLISH LEXICON 1882 (Sir Henry Stuart Jones ed., 9th rev. ed. 1996). This practical branch of Stoic ethics dealt with particular problems such as marriage and the treatment of slaves. See Gerard Watson, *The Natural Law and Stoicism*, in PROBLEMS IN STOICISM 216, 238 n.45 (A.A. Long ed., 1971).

322. See J.A. CROOK, LEGAL ADVOCACY IN THE ROMAN WORLD 30–33 (1995) (describing Athenian forensic advocacy). The Greek style of advocacy also spread to other Hellenistic cities. See *id.* at 36.

323. Catherine Atherton explained the significance of Stoic dialectics:

One of the central tenets of Stoic philosophy is that the universe is a divine, rational, and coherent ordering. . . .

. . . .
It is [in the Stoic sage's use of reason to act in accordance with nature] that dialectic demonstrates its practical value. As a body of theoretical knowledge, dialectic furnishes relevant technical information about the sorts of item that constitute, structure, and characterize minds, language, and the arguments by which men seek to reason and convince.

CATHERINE ATHERTON, THE STOICS ON AMBIGUITY 51–53 (1993).

324. Elizabeth Rawson, *The Introduction of Logical Organisation in Roman Prose Literature*, 46 PAPERS BRIT. SCH. ROME 12, 28 n.64 (1978).

the narrow question of whether Hellenistic logic and rhetoric contributed to the organization of legal data, Fritz Schulz³²⁵ and Watson³²⁶ interpret the limited evidence in radically different ways. Elizabeth Rawson has advanced the debate by setting it in a wider context. Looking at legal literature as part of Latin prose as a whole, she notes a gradual increase in specialization during the first century BCE with some division between speakers in the courts and legal experts, adding: "These were however only slow developments, and the lawyers remained men of wide education and background, conversant with the fashionable subjects of grammar and rhetoric, and often with philosophy."³²⁷ On the even narrower question of whether Roman jurists used Stoic propositional logic, Juan Miquel has demonstrated examples of such use in three classical jurists.³²⁸ The defining choices about the shape of legal literature in Latin were made between 150 and 50 BCE, but the Romans who made these choices drew on Hellenistic, particularly Stoic, philosophy written in Greek between 300 and 150 BCE. The extent to which Stoic dialectics imparted a self-conscious theorizing to our law remains in dispute. But there is no doubting the influence of Stoic jurisprudence on Romans and, through them, on Roman Christians.³²⁹ In Stig Strömholm's words: "[T]he Stoics gave Occidental legal thinking (and political theory in a broader sense) an ethical content which has played an exceedingly important role ever since."³³⁰

Our European legal tradition turns out to be older and more polyglot than one might have guessed. It was a joint venture between pragmatic Roman patricians and Hellenistic Greek philosophers. This fact drapes a certain objectivity around my proposal to compare the births of Buddhist, Chinese, and European law. If we are looking at the wider Hellenistic world instead of central Italy and its dependencies, we can add into our consideration Greece and the Eastern Mediterranean, Ptolemaic Egypt, Seleucid Iran, and Graeco-Bactrian Afghanistan. Combine these countries with India and China, and we have, I think, exhausted the literate cultures of Eurasia during the last five

325. Schulz spoke for those who believed the Greek influence was great:

The importation of dialectic was a matter of extreme significance in the history of Roman jurisprudence and therefore of jurisprudence generally. It introduced Roman jurisprudence into the circle of the Hellenistic professional sciences and turned it into a science in the sense in which that term is used by Plato and Aristotle no less than by Kant.

SCHULZ, *supra* note 320, at 67 (footnote omitted).

326. See ALAN WATSON, *LAW MAKING IN THE LATER ROMAN REPUBLIC* 183 (1974) ("[O]f the idea of *species* as a subdivision of *genus* there is not the slightest trace in juristic thinking in the Republic.").

327. Rawson, *supra* note 324, at 25.

328. See Juan Miquel, *Stoic Logic and Roman Jurisprudence*, in *THE WESTERN IDEA OF LAW* 333, 334-37 (J.C. Smith & David N. Weissstub eds., George H. Kendal trans., 1983). This is a partial translation of an article that appeared as Juan Miquel, *Stoische Logik und Römische Jurisprudenz*, 87 *ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE: ROMANISTISCHE ABTEILUNG* 85 (1970).

329. Stoic jurisprudence, through St. Paul and the Church Fathers, influenced Eastern Orthodoxy as well. See Stanley S. Harakas, *Eastern Orthodox Perspectives on Natural Law*, 24 *AM. J. JURIS.* 86, 89 (1979).

330. STIG STRÖMHOLM, *A SHORT HISTORY OF LEGAL THINKING IN THE WEST* 43 (1985).

centuries BCE. Given the importance of literacy to the manifestations of cultural tradition, there can be nothing contingent about my choice of China, India, and the Hellenistic world as the areas to be compared. The contingency (which I argued above is to be found in any comparative law project) lies in my choice of Stoics, Buddhists, and Huang-Lao as the traditions within each area that merit special consideration.³³¹ Invoking classical learning provides my comparison with an important resource: The classicists have delved much more deeply than Sinologists or Buddhologists into the relationship between philosophy and written law. In the next Part, I shall suggest that the Stoic, Buddhist, and Huang-Lao philosophies share certain qualities that facilitated the birth of written law.

V. NATURAL LAW AS A COMPARATIVE TOOL

How can we best describe the qualities shared by Buddhist, Huang-Lao, and Stoic texts? To use a European expression as familiar as “natural law” smacks of ethnocentrism. Yet how else can Europeans begin to understand the wholly unfamiliar belief systems of India and China? Whether natural law proves useful as a cross-cultural comparative tool can only be shown by attempting the comparison at length and in detail. This is a task that I hope to pursue and in which I hope to be joined by classicists and Sinologists. Meanwhile, I must pay off a debt to Peerenboom. When I first read *Law and Morality in Ancient China*, I was trying, with little success, to compare natural law themes in Buddhism and Stoicism. Peerenboom's use of natural law as a comparative concept inspired me. What Defoort refers to as his “relentless pursuit of clear criteria”³³² provokes both admiring agreement and productive disagreement. In this Part, I discuss why my use of natural law as a comparative concept differs from his.

Peerenboom deploys a series of analytical distinctions to separate the various natural law theories.³³³ At the Chinese end of the comparison, this enables him to divorce natural law from theology: The Huang-Lao can be natural lawyers although they do not believe in a creator God. At the European end, it enables him to produce a typology of our natural law tradition. His four main varieties are divine law (whose “laws are the direct commands of a transcendent deity who represents an ultimate source of value”),³³⁴ laws of nature (which “ground law in the normatively transcendent natural order”),³³⁵ moral grounds (“which are seen as self-evident or to reflect some ultimate

331. The Legalists have very good claims to be included. The Hindu dharmaśāstrists will also stake their claim.

332. Defoort, *supra* note 256, at 348.

333. See *supra* text accompanying notes 252–55.

334. PEERENBOOM, *supra* note 2, at 21.

335. *Id.* at 119.

value that cannot be compromised or questioned”),³³⁶ and pure reason (which “seeks to provide rational foundations for law and legal obligations by deriving them from self-evident first principles or from ‘truths’ about human nature”).³³⁷ To illustrate these varieties he uses contemporary juristic discussion: John Finnis exemplifies pure reason,³³⁸ the moral grounds are defined by H.L.A. Hart and Ronald Dworkin’s refutations of positivism,³³⁹ and foundationalism is contrasted with the coherence theories of John Rawls and Joel Feinberg.³⁴⁰ Peerenboom’s view of natural law is weighted towards the twentieth century; he favors contemporary theorists over their predecessors from the Enlightenment colleges or the medieval seminaries. Let us call Peerenboom’s view “developed European natural law.” By comparing the Huang-Lao with this, he has opted for a comparison that is doubly displaced in space and time, that crosses both cultural barriers and the millenia. I propose a singly displaced comparison that sets the Huang-Lao against their European contemporaries, the Stoics. Let us call the ideas shared by the texts of these two traditions (and also their Buddhist contemporaries in India) “early natural law.” The watershed between early and developed lies somewhere between the Emperors Constantine (who was proclaimed Emperor in 306 CE) and Justinian (who died in 565 CE), during the era when Christian ideas were mixed into the Stoic. I argued in Part IV that we cannot measure the relative value of one comparison over another. Peerenboom’s developed European natural law and my early natural law are equally good. But they generate different versions of European natural law. On the far side of the watershed, early natural law may have more in common with India and China than with the developed Christian tradition.

Peerenboom gives the impression that developed European natural law is primarily about transcendence and dualism. I agree that dualism is endemic in European thought and that transcendence is the lowest denominator common to all natural law theories, but the natural law tradition contains as many ideas on politics or science as on metaphysics and epistemology. Although not present in every theory, they deserve our attention, too.³⁴¹ We can cast Justinian, Aquinas, and Hugo Grotius from our minds, the better to understand the pre-Christian natural law that Zeno and Chrysippus taught. In doing so, we shall have dug down to the very taproot of developed European natural law. As Maryanne Cline Horowitz puts it: “While the Stoics borrowed some of [the four unit-ideas of natural law, i.e. reason, common notions, seeds, and sparks]

336. *Id.* at 22.

337. *Id.* at 119.

338. *See id.* at 23.

339. *See id.* at 22.

340. *See id.* at 20.

341. I am driven to this stance by my attempt to introduce Buddhism into the comparison, since Buddhism appears to combine transcendence with a militant antidualism.

from their philosophical predecessors, they themselves did the work of synthesis, building upon these unit-ideas a coherent doctrine of natural law in man."³⁴² But we shall have to take the Stoics more seriously than Gerard Watson, who warns us never to forget "the origins of natural law and its early rhetorical flavour. The rhetoric may be inspiring at times as in the case of Antigone and the 'unwritten laws'; but it remains rhetoric. And rhetoric is not designed to promote clear thinking."³⁴³ Watson has misunderstood what we can hope to learn from old law texts. Just as archaeologists tell us what was put in the grave, but not why it was put there, so interpreters of texts tell us what rhetoric was deployed, but not how it was understood at the time.

In relation to *The Golden Yoke*, I described what the surviving texts cannot tell us as the hermeneutic that proto-lawyers apply to legal literature.³⁴⁴ It can also be described as the culture's repertoire of legal reasoning. We can only hope to know it if it has survived as an oral tradition of legal education, embodied in a continuing lineage of pupils and pupil-masters. Whatever it was that Cicero learned during his pupillage with Scaevola³⁴⁵ cannot now be reconstructed from the surviving literature; classical legal reasoning is lost beyond redemption. There are as many interpretations as interpreters of Cicero's legal theory.³⁴⁶ We have lost the oral lineage of the Burmese legal profession and, but for French, would have lost that of the Tibetan specialists as well. All that has survived from antiquity is the natural law rhetoric shorn of the belief system that made it effective. To understand early natural law we have to reimagine the beliefs and contexts that made natural law rhetoric effective. I shall discuss three areas in which this early natural law differs from Peerenboom's developed European tradition. First, it concentrates on the relationship between law and science rather than that between law and morals. Second, its politics concentrate on the problem of controlling the bad king rather than the justification of natural rights. Third, it prefers to analyze situations rather than rules. These three tendencies can be demonstrated in the surviving texts from China, India, and the Hellenistic world.

342. Maryanne Cline Horowitz, *The Stoic Synthesis of the Idea of Natural Law in Man. Four Themes*, 35 J. HIST. IDEAS 3, 3 (1974); cf. Gisela Striker, *Following Nature: A Study in Stoic Ethics*, 9 OXFORD STUD. ANCIENT PHIL. 1, 35 (Julia Annas ed., 1991) ("It would be an exaggeration to say that the idea of a natural law was invented by the Stoics. . . . However, the Stoics were the first to introduce the idea of nature as a kind of personal lawgiver . . .") (footnote omitted).

343. Watson, *supra* note 321, at 221. By contrast, a contemporary pragmatist judge refuses to be embarrassed by the rhetoric. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 238 (1990) ("Our dominantly positivistic discourse has enough natural law play in its joints to give us all the rhetorical flexibility we need.").

344. See *supra* text accompanying notes 28–29.

345. See SCHULZ, *supra* note 320, at 44.

346. See, e.g., Ludovico V. Ciferri, *Cicero's Conception of Iurisprudentia*, 38 REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITÉ (3d s.) 103, 113–19 (1991) (arguing that Cicero believed Roman lawyers should combine previously distinct roles of courtroom orators and *junsconsults*); J.W. Tellegen, *Oratores, Iurisprudentes and the "Causa Curiana"*, 30 REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITÉ (3d s.) 293, 294–95, 309–11 (1983) (arguing that classicists' distinction between orators and *junsconsults* is incorrect and that Cicero described courtroom advocates as skilled legal experts).

Examining the developed European natural law, Peerenboom regards the necessary relation between law and morals as a "fundamental tenet of natural law theory."³⁴⁷ Examining the early natural law, I would apply that label to the relation between law and science. Buddhist, Huang-Lao, and Stoic ethics formed part of all-inclusive pictures of how the world worked. Are such inclusive pictures best thought of as schools of thought, religions, or ideologies? In a very different context, Frederick Crews has defined a term that fits better than any of these:

While classic Marxism and psychoanalysis insist upon their observational basis, they also constitute inside critiques of received knowledge . . . , and they bestow epistemic privilege on a group of deep knowers . . . who possess an antidote to chronic error. . . . [T]hey are *countersciences*—creeds that use a dry mechanistic idiom and an empirical façade to legitimize "deep," morally engaged revelations³⁴⁸

Early natural law justified universal ethical laws ("'deep,' morally engaged revelations") in terms of proto-science ("a dry mechanistic idiom and an empirical façade"). Stoics and Buddhists, like Marxists and Freudians, had all-embracing worldviews; their countersciences provided them with answers to practically any question you might care to ask. Crews argues that because their claims cannot be falsified, Marx and Sigmund Freud should not be regarded as scientists.³⁴⁹ Postmodernists would retort that the truth claims of quantum physics or organic chemistry rest ultimately on the shared beliefs of their practitioners, wherefore they are neither more nor less scientific than Freudian psychoanalysis.³⁵⁰ Because science is a branch of human understanding, they would argue, its pronouncements cannot be wrung free of human fallibility. The early natural lawyers used a structurally similar argument: Because science is a branch of human understanding, its pronouncements must have ethical significance. Connected by chains of cause and effect, science was ethical and ethics was scientific. Stoics and Buddhists, who had more elaborate and systematic causation theories than the Huang-Lao, were driven too close to determinism for their own comfort. An important function of Stoic and Buddhist natural law was to preserve free will, or at least moral autonomy, within a scientifically predictable world.³⁵¹

347. PEERENBOOM, *supra* note 2, at 20.

348. Frederick Crews, *In the Big House of Theory*, N.Y. REV. BOOKS, May 29, 1986, at 36, 38 (book review).

349. *See id.*

350. *See* Stanley Fish, *Professor Sokal's Bad Joke*, N.Y. TIMES, May 21, 1996, at A23 (arguing that science is "social construction").

351. *See* TROELS ENGBERG-PEDERSEN, *THE STOIC THEORY OF OIKEIOSIS: MORAL DEVELOPMENT AND SOCIAL INTERACTION IN EARLY STOIC PHILOSOPHY* 217-19 (Stud. Hellenistic Civilization No. 2, Per Bilde et al. eds., 1990) (arguing that concurrence of causal factors made Stoic notions of individual responsibility

I must avoid giving the misleading impression that the early natural lawyers had a clear picture of what science was. Knowledge had not yet been carved up into disciplinary fields: Early law and ethics were part of an integrated wisdom that included proto-history as well as proto-science. The early legal authors wanted to know what ethical conclusions could be drawn from science, history, and current affairs. They drew on three types of books: first, records of astronomical data; second, the great cultural compendia that preserved the ancestral ethics and wisdom; and third, historical chronicles. Astronomy enabled the king to lay down the calendar. The cultural compendia (by which I mean Homer and Hesiod for Hellenistic Greece, the *Vedas* for North India, and the *Shijing* (Classic of Odes) and *Zhou li* (Rites of Zhou) for pre-Confucian China)³⁵² contained ancestral ethics and such wisdom as had survived from the Golden Age. The proto-historical chronicles served as collections of precedents, understood as much in the scientific as in the legal sense: They were the records of social science experiments in what could and could not be achieved.³⁵³ With hindsight, we would say that astronomy dealt with the universally true, the ethical compendia contained what was true for several kingdoms sharing a common language, and the chronicles told the true history of a particular kingdom. But the purpose of natural law rhetoric is to conflate these sources. The compilers were anxious to legitimate their written law by whatever arguments lay to hand, and thus blurred the scientific with the ethical, the descriptive with the prescriptive.

That one of the *Boshu*'s four books is called *Weighing by the Scales* reminds us that mensuration (the measurement of space and time) is especially productive of natural law rhetoric, because it sits on the cusp between the scientifically determined and the arbitrary. The standardization of measurements was a central policy of the Qin emperor.³⁵⁴ For all his subjects (except crooked market vendors), his mensuration policy must have been the single obvious benefit of Qin unification. One can see why his propagandists would link a potentially unpopular legal unification policy to such a successful policy.³⁵⁵ Their message was that the imperial code could be relied on as the

possible); Bandula Jayawardhana, *Determinism and Indeterminism*, in 4 *ENCYCLOPAEDIA OF BUDDHISM* fascicle 3, at 392, 397 (Ananda W.P. Guruge & W.G. Weeraratne eds., 1988) (arguing that conditioned becoming as middle way between being and not-being is also middle way between free will and determinism); Charlotte Stough, *Stoic Determinism and Moral Responsibility*, in *THE STOICS* 203, 222–25 (John M. Rist ed., 1978) (arguing that moral responsibility is our intelligent assent to what will happen to us anyway).

352. For extracts from the Chinese compendia, see Weng Shaojun, *A Comparative Study of Natural Philosophy in Pre-Qin China and Ancient Greece*, 21 *CHINESE STUD. PHIL.* 3, 4–5 (1990).

353. For instance, that the fall of Qin proved that the common people would not put up with harsh Legalist policies. In India, such chronicles did not appear until well into the Common Era. Buddhist literature provides the earliest Indian historical works but is concerned solely with personalities (such as King Asoka) important to Buddhism.

354. See Bodde, *supra* note 205, at 59–60. He also standardized cash (the measure of exchange value), *see id.* at 60, and unified the script (the measure of information exchange), *see id.* at 56–58.

355. See PEERENBOOM, *supra* note 2, at 68 (quoting two passages from *Boshu* linking law with

farmer relied on moon and calendar to sow and reap, on scales and numbers to buy and sell. Then as now, a belief in naturally given units of measurement prevailed. It was as convincing to say, "I have discovered the proper size for a bushel," as to say, "I order that my imperial standard bushel be used." Another passage from the falsifiable to the contingent is offered by the calendar. Although it prescribes the ritual tempo of human social life, its authority is founded on description of the night sky. Greek astronomers of the fifth century BCE recognized that their old eight-year cycle for reconciling the lengths of the solar and lunar years was less accurate than the new nineteen-year Metonic cycle. Most city-states adopted new calendars based on the new science, treating the length of the year as constrained by nature, but Athens, Boetia, and Actia chose three different days for New Year's Eve.³⁵⁶ None of them was right. Science can help us measure the length of the year more accurately, but cannot help us choose on which night, out of 365 equally good candidates, we should hold our party. An emperor who uses the right kind of rhetoric can make his arbitrary choice sound impeccably scientific. "The wisest astronomers of this, the wisest of cities," he might say, "advise me that the year starts with the heliacal rising of Beta-Delphini."

The second area in which early natural law differs from developed European natural law is the political. The natural law revival of the last half century has achieved its practical gains in the field of human rights. Such transnational rights can perhaps be regarded as a consolation prize for the failure to achieve a world government. The Huang-Lao and the Stoics were also deeply involved with political centralization.³⁵⁷ The Huang-Lao version of natural law helped keep the notion of empire alive after the debacle of the Qin dynasty, while the Stoics looked back wistfully on Alexander's failure to secure his succession:

Alexander, albeit for a short while, had shown that almost all the known world could be combined, that barbarian and Greek could be subjects in one empire, but the key point is that he failed and this led to the subsequent disorder. Zeno and his contemporaries suffered from this failure, yet the possibility of unity could be seen.³⁵⁸

The affinities between universal law and world empire are obvious enough, but the political problems caused by empire need further emphasis. Peerenboom

weights and measures).

356. See APURBA KUMAR CHAKRAVARTY, *ORIGIN AND DEVELOPMENT OF INDIAN CALENDRIAL SCIENCE* 20 (1975). Chakravarty similarly notes that in India, "[i]n more ancient times, we are told that . . . different castes began their years in different seasons." *Id.* at 19 (quoting *Jyotisa-bharya* of Nimaya Sindhu).

357. This was less true of Buddhism. During the Buddha's lifetime, the small kingdoms of North India were being absorbed by larger ones. Not until two centuries later did Asoka unite the larger kingdoms into an empire.

358. ANDREW ERSKINE, *THE HELLENISTIC STOA* 34 (1990).

understands Huang-Lao natural law "in part as an attempt to curtail the powers ceded a Legalist ruler."³⁵⁹ His analysis of Han China coincides with my conclusions about Buddhist India. The overriding constitutional problem of the ancient world was this: "Given the political preeminence of the king (or emperor or sultan) who can restrain him from evil and encourage him to do good?"³⁶⁰ Hellenistic philosophy offered answers to this question. But we have impoverished our European political discourse by taking Plato and Aristotle, rather than Stoic natural law, as our starting point. Compared with those of India and China, our ideas on controlling kingship are underdeveloped, and our literature on the pragmatics of autocracy a woefully late development: India's Machiavellian³⁶¹ *Arthashastra*³⁶² and China's Machiavellian³⁶³ Legalist literature predate Niccolo Machiavelli by well over a millenium. Very few of the European leaders between Alexander of Macedon and Thomas Jefferson thought of themselves as democrats. In this sense, the two centuries of Greek experimentation with democracy were an aberration that knocked our political theory out of step with the rest of Eurasia. Because Plato and Aristotle wrote from two centuries' experience of nonmonarchical government, Europe now talks about politics rather than kingship and looks for a constitution rather than an ethical canon to limit government's activities. This quirk of history has enabled liberal modernity to promote the city-states of fifth-century BCE Greece as a golden age that should be retrieved. Liberal modernity's global project is to persuade Paraguay, Nigeria, and Korea (to take names at random) that American, African, and Asian history started in Athens.³⁶⁴

I turn now to the third area in which early natural law differs from developed European natural law, and in which my use of natural law as a comparative tool therefore differs from Peerenboom's. His developed tradition tends to think of natural law as a set of rules, as found for example in the Ten Commandments, the *Corpus Iuris Civilis*, Aquinas's *Summa Theologica*, or Grotius's *De Jure Belli ac Pacis*. My early tradition thinks of it as a technique

359. PEERENBOOM, *supra* note 2, at 140. The great Legalist Han Fei espoused "positive law where the ultimate authority is the word of the sovereign." *Id.*

360. Huxley, *supra* note 163, at 411.

361. See MAX WEBER, MAX WEBER ON CAPITALISM, BUREAUCRACY AND RELIGION 22 (Stanislav Andreski ed., 1983) (noting that Machiavelli had "predecessors in India"); *id.* at 85 (describing Indian political theory as "quite Machiavellian"). Weber does not specifically mention Kautilya's *Arthashastra*, but the reference is obvious.

362. KAUTILYA'S ARTHASASTRA (R. Shamasastri trans., 4th ed. 1951). See generally A.L. BASHAM, THE WONDER THAT WAS INDIA 51-52, 80-137 (3d rev. ed. 1968) (describing ancient Indian politics and *Arthashastra*'s political theory).

363. See PEERENBOOM, *supra* note 2, at 153-61, 318 nn.33 & 39.

364. See, e.g., Andrew Hacker, *Editor's Preface* to DONALD KAGAN, THE GREAT DIALOGUE: HISTORY OF GREEK POLITICAL THOUGHT FROM HOMER TO POLYBIUS at vii, vii (1965) (arguing that ideal of civilized government "is our legacy from the ancient world" and that Greek political ideas and institutions remain "unfinished business" from "the out-stations of the Congo to the villages of the Colombian Andes, from the jungles of Southeast Asia to the rural roads of the Mississippi Delta").

for handling situations. In the Pali Buddhist context, I called this technique weak antinomianism.³⁶⁵ It requires careful observation of the world's natural processes coupled with a meditative inquiry into one's own human nature and understanding of the world. The Huang-Lao epistemology led the adept through graded steps from emptiness, through tranquillity, to elimination of personal bias, and on to intuitive clarity.³⁶⁶ Having put himself in order, the adept was able to "manipulate the orderly to put in order what [wa]s out of line, to grasp the one to understand the many, to eradicate what br[ought] injury to the masses and to maintain what [wa]s appropriate for them."³⁶⁷ The Buddhist *arahant* (one who has overcome greed, fear, and delusion) achieved a full knowledge of karma by studying individual cases of rebirth.³⁶⁸ Having meditated enough to achieve retrocognition, he could treat the past lives of present humans as observable scientific data. Knowing whom karma punishes for doing what, he knew the natural laws. The early Stoics envisaged scrutinizing all natural processes to discover the *logos* (the clockwork by which determinate nature proceeds).³⁶⁹ The Stoic sage would then internalize the *logos* so that his own wishes coincided exactly with it.³⁷⁰ Lucius Annaeus Seneca wrote two very long letters summarizing the Hellenistic and Roman debates about the value of *praecepta* (ethical rules formulated legalistically) as against training the self to achieve sagacity.³⁷¹ From these, I.G. Kidd has reconstructed the range of early Stoic views on the relative value of rules and situation-techniques.³⁷² Zeno and Chrysippus, he says, had a twin ethical strategy. They showed the would-be Stoic sage how to live without rules following *logos*, virtue, and nature, while to the Stoic in the street, *l'homme moyen sensuel*, they expounded the ethical precepts of *ta kata physin* (the things that accord with nature).³⁷³

365. See *supra* text accompanying note 175.

366. See PEERENBOOM, *supra* note 2, at 70.

367. *Id.* at 53 (quoting Boshu).

368. The Buddha did not describe himself as omniscient. Rather he claimed to be a "threefold-knowledge man." . . . This threefold knowledge, he sa[id], consist[ed] of (1) retrocognition of past lives . . . , (2) the knowledge of the passing away and coming to be of beings according to the consequences of their actions . . . and (3) the knowledge of the destruction of defiling impulses." Jayawardhana, *supra* note 351, at 406 (quoting 2 THE COLLECTION OF THE MIDDLE LENGTH SAYINGS (MAJJHIMA-NIKAYA), *supra* note 178, at 160).

369. See Striker, *supra* note 342, at 3-4 (noting that Zeno defined goal of ethics as living in accordance with *logos* or "principle" of nature).

370. The process was profound and difficult: None of the early Stoics claimed to have achieved sagehood, and no contemporary set of laws could live up to the natural law standard. See ERSKINE, *supra* note 358, at 114-16.

371. See 3 SENECA, AD LUCILIUM EPISTULAE MORALES 10-105 (Richard M. Gummere trans., 1925).

372. See I.G. Kidd, *Stoic Intermediates and the End for Man*, in PROBLEMS IN STOICISM, *supra* note 321, at 150, 164-65.

373. See *id.* at 165. Chrysippus is referring to these precepts when he says: "The law of all things . . . is that which enjoins men, who are by nature political animals, to do the things which must be done and that which proscribes the things which must not be done." JOSIAH B. GOULD, THE PHILOSOPHY OF CHRYSIPPUS 165 (1970) (quoting Chrysippus, *On the Law*, in 3 STOICORUM VETERUM FRAGMENTA:

Early natural law's general preference for situational ethics over explicit rules must surely connect with its preference for theories of causation that emphasize complexity and multiplicity. The Buddhist theory, which stresses that the multiple causes act with equal force, offers a knock-down argument to the concept of rule: A rule is a schema that deals with situations by unscientifically distinguishing causal efficacy. Certain causes are foregrounded, others backgrounded. A rule about inheritance, for example, foregrounds kinship and backgrounds the cause of death. Even in common law jurisdictions, however, there can be extreme situations in which the cause of death affects our sense of justice, as *Riggs v. Palmer*³⁷⁴ demonstrates. To justify evading an inconvenient rule, the European tradition has to resort to devices like the maxims of equity or Dworkinian principles: These are needed, Buddhists would say, to patch over the holes in a leaky theory of causation.

This shift of emphasis from rules to observation of what goes on in the world also shifts the emphasis from nature as legislator to nature as punisher.³⁷⁵ In Buddhism, karmic punishment is as natural a process as that which links chlorofluorocarbon gases to the degradation of the ozone layer.³⁷⁶ When Buddhist *vinayadharas* warn that corrupt officials risk rebirth with deformed and enlarged scrota,³⁷⁷ they are offering prudential advice, just as if they had warned us that if we put our hands in the fire, we will feel pain. Hadley Arkes identifies similar prudential reasoning behind Cicero's condemnation of the cancellation of debts.³⁷⁸ Cicero understood that it would bring swift, certain consequences: "[A] rule so bound up with the grounds of equity could not be violated without causing the surest recoil on the part of its victims."³⁷⁹ In Christianity, by contrast, the inevitable fate of the sinner—a brusque exchange with St. Peter, followed by consignment to Hell—operates supernaturally. Borrowing H.L.A. Hart's terms, we can say that the developed European tradition has preached a primary-rule-only natural law, while the early tradition expounded a natural law containing secondary rules of

CHRYSSIPPI FRAGMENTA MORALIA [ET] FRAGMENTA SUCCESSORUM CHRYSSIPPI ¶ 314 (Ioannes Ab Amm ed., 1903)).

374. 22 N.E. 188 (N.Y. 1889). For a classic discussion of this case's refusal to permit a parricide to inherit from his father, see BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 40–43 (1921).

375. The Legalists were halfway between the Hellenistic and the Indian positions. They thought that state sanction should mimic natural sanction in its severity and inexorability. "If the law is made severe and committing an offence is as fatal as walking into this gorge, then no one will dare violate it. Peace and order will prevail." *THE SEVERE CODE OF THE LEGALIST: THE SAYINGS OF HAN FEI ZI* 51 (Tsu Chih Chung ed. & Alan Chong trans., 1991).

376. See *supra* notes 61–64, 183–86 and accompanying text.

377. The example comes from the *Samantapasadika*. See BAPAT & HIRAKAWA, *supra* note 128, at 351.

378. See Hadley Arkes, *That 'Nature Herself Has Placed in Our Ears a Power of Judging': Some Reflections on the 'Naturalism' of Cicero*, in *NATURAL LAW THEORY*, *supra* note 89, at 245, 246 ("What is the meaning, [Cicero] asked, of an 'abolition of debts, except that you buy a farm with my money; that you have the farm, and I have not my money?'" (quoting 21 *CICERO IN TWENTY-EIGHT VOLUMES DE OFFICIIS* 261 (Walter Miller trans., 1913))).

379. *Id.* at 269.

punishment.³⁸⁰ The distinction can be explained by historical context: The early natural lawyers were concerned not to promote a new set of ethical rules, but to defend an existing set. I borrow this argument from J.G.A. Pocock, who investigated pre-Han China in search of the origins of history. He found a sequence of doctrines that were to be repeated in other places at other times:

First, a set of institutions existing in the past is described as authorising the maintenance of the same institutions in the present; next, historical criticism gives rise to the idea that the institutions of the past are appropriate only in the circumstances of the past, which no longer obtain in the present; thirdly, the authority of antiquity is restored, but on grounds which no longer vest authority in antiquity as such, being those of universal and timeless validity. We appear to have moved from tradition to reason³⁸¹

Tradition, argues Pocock, has been knocked off its plinth by sophists and cynics. Natural law is the movement to reestablish tradition on a new plinth labelled "universal validity." History, for the early natural lawyers, was as thoroughly ethicized as science. The chronicles, the astronomical works, and the early law texts all had a bearing on how good citizens should lead their lives.

Postmodernism similarly sees all knowledge as part of human understanding. There are hints, in areas close to law, that postmodernists are also developing a preference for situational ethics over rules. Lyotard tells us that "politics in itself is not a rule-bound enterprise."³⁸² Rorty suggests that "[i]n a moral world based on what [Milan] Kundera calls 'the wisdom of the novel' moral comparisons and judgments would be made with the help of proper names rather than general terms or general principles."³⁸³ As postmodern jurisprudence expands its vision, I expect to find these hints developed.³⁸⁴ The place of rules could be taken by maxims, *topoi*, which act

380. Cf. H.L.A. HART, *THE CONCEPT OF LAW* 97-98 (Joseph Raz & Penelope A. Bulloch eds., 2d ed. 1994) (1961) ("Most [legal] systems have supplemented the primary rules of obligation by further secondary rules, specifying or at least limiting the penalties for violation . . .").

381. J.G.A. Pocock, *The Origins of Study of the Past: A Comparative Approach*, 4 COMP. STUD. SOC'Y & HIST. 209, 224 (1962). Weber anticipated one of Pocock's points: "[Natural law] is the specific and only consistent type of legitimacy of a legal order which can remain, once religious revelation and the authoritarian sacredness of a tradition and its bearers have lost their force." WEBER, *supra* note 28, at 288.

382. van Reijen & Veerman, *supra* note 278, at 298 (quoting Lyotard).

383. Richard Rorty, *Philosophers, Novelists, and Intercultural Comparisons: Heidegger, Kundera, and Dickens*, in *CULTURE AND MODERNITY: EAST-WEST PHILOSOPHIC PERSPECTIVES*, *supra* note 15, at 3, 14 (quoting MILAN KUNDERA, *THE ART OF THE NOVEL* 158 (Linda Asher trans., Grove Press 1988) (1986)).

384. Here as elsewhere, however, there will be argument as to whether the postmodern is an intensification of the modern or a reaction against it. Steven Lukes has discerned a hostility to rules in the works of Marx, the *doyen* of modernists. See LUKES, *supra* note 66, at 56-57. Lukes says of Marx's criticism of law:

[T]he objection is . . . that any system of rules specifying justifiable claims (*Recht*) treats people unequally, since, by its very nature, it applies a common standard to them, considering them in one particular aspect only. . . . [Marx] seems to have supposed that any rule of law or

as acceptable points of departure for rival dissections of the instant case. These would signal the boundaries of acceptable rhetoric and ensure that participants can understand each other's premises.

Our different comparisons have led Peerenboom and me to take different views about the degree of antagonism between postmodernism and natural law. My position is that postmodern ethics shows signs of convergence with early natural law. He, looking at developed natural law, regards the Huang-Lao position as philosophically untenable and "out of step with the current postmodern trend away from natural law theories to a more hermeneutically sensitive theory à la Dworkin."³⁸⁵ But surely this trend away from natural law predates postmodernity? Kant's trichotomy of pure reason, practical reason, and judgment was an antifoundational argument.³⁸⁶ After the attacks of Bentham,³⁸⁷ Maine,³⁸⁸ and Marx,³⁸⁹ there was little left for Rorty and Lyotard to demolish. Lyotard has moved some way beyond the positivism and historicism espoused by these modernists. He intensifies Kant's trichotomy into an attack on the subject,³⁹⁰ but at the same time he is confidently committed to "'natural rights, . . . [i.e.,] the fundamental freedoms which prescribe the limits of social fabrication.'"³⁹¹ Lyotard's fragmented selves are not ashamed to draw this much ethical conclusion from their separate understandings of the world. Antifoundationalism does not prevent us from drawing ethical conclusions from nature. Nor does the incoherence of grand narratives allow us to say, "I understand Auschwitz as an event quite without any ethical

morals, which by its very nature singles out certain differences between people as grounds for differential treatment, is for that very reason "abstract" and "one-sided."

Id.

385. PEERENBOOM, *supra* note 2, at 25; *see also id.* at 24 (expressing belief that "the Rorty-Sellars critique seriously undermines the foundationalism of natural law doctrines").

386. *See* YVES R. SIMON, *THE TRADITION OF NATURAL LAW* 42 (Vukan Kuic ed., 1967) ("[T]he fact remains that Kant (1724–1804) is the philosopher who expressed, with more sharpness and consistency than any of his predecessors, the contrast between nature and morality.").

387. *See* 2 JEREMY BENTHAM, *Anarchical Fallacies; Being an Examination of the Declarations of Rights Issued During the French Revolution*, in *THE WORKS OF JEREMY BENTHAM* 501 (John Bowring ed., 1843) (characterizing "natural and imprescriptible rights" as "nonsense upon stilts").

388. Maine described natural law as "the ancient counterpart to Benthamism." MAINE, *supra* note 53, at 76. Adam Kuper argues nonetheless "that Maine's model was an inversion of the classic models of the State of Nature, which he attacked so furiously, but whose idiom he adopted." Adam Kuper, *Ancestors: Henry Maine and the Constitution of Primitive Society*, 1 *HIST. & ANTHROPOLOGY* 265, 284 (1985).

389. *See* 3 KARL MARX, *CAPITAL* 339 & n.55 (Int'l Pubs. 1967) (1894) (criticizing defense of capitalist interest on loans as "natural justice"). A concept of justice might, however, be an appropriate ideology for a particular stage of human history: "The justice of the transactions between agents of production rests on the fact that these arise as natural consequences out of the production relationships. . . . Th[e] content [of these transactions] is just whenever it corresponds, is appropriate, to the mode of production. It is unjust whenever it contradicts that mode." *Id.* at 339–40.

390. *See* van Reijen & Veerman, *supra* note 278, at 294–95 (quoting Lyotard's argument that "'the crisis of the subject after Kant'" concerns "'the unification of the heterogeneous or autonomous regimes of judgment'" identified by Kant, "'according to which it is a question of truth, or of beauty, or of the good'").

391. *Id.* at 297–98 (quoting Lyotard). This passage serves as an answer to Lyotard's critics who would portray him as an amoralist for whom anything goes. For Lyotard certain minimum values are inescapable, and human rights must be among our moral commitments.

significance." We should tease out ethical implications from current affairs, from history, from technology, and indeed from soap operas, talk shows, and advertisements. This, which I understand to be the postmodern position, is entirely consistent with the views of the Buddha, the *Boshu*, and Zeno. These early natural lawyers, however, went a stage further: They regarded the data acquired by introspective emptying-of-the-mind as a suitable foundation for justifying truth claims. Seen from this angle, postmodernism is early natural law minus meditation.

Because Weber backed off at the last minute, Peerenboom is the first person this century to make serious use of natural law as a comparative tool. Weber was tempted³⁹² but felt that the Christians had beaten him to it.³⁹³ Instead he chose to characterize Asian law as sacred law.³⁹⁴ This use of religion as a comparative tool was designed to bring out the differences between Asian and formal-rational, secular European law. The advantage of using natural law as a comparative concept is that it will do the opposite: It is designed to emphasize similarities between Europe and Asia.

VI. CONCLUSION

In the last Part, I discussed how Peerenboom and I believe Europeans might best imagine their way across the incommensurability barrier. He proposes that we use the idea of Huang-Lao as natural lawyers to gain a toehold on the glassy cliffs of Han Chinese culture. I would prefer us to dig our way back to the roots of our own legal tradition and immerse ourselves in Hellenistic learning before scaling the cliffs. French, meanwhile, has provided a much easier path across the barrier separating us from Tibet. Along with her narratives, she offers architectural plans, line drawings, and ethnographic photographs of Tibet from the 1920s to the 1980s.³⁹⁵ But she is not interested in finding a European analogue to Tibetan Buddhism. She would rather we used Tibet to find out more about ourselves: We are to stare into the glassy cliffs of the Himalayas and describe what we see reflected in them. I summarized French's challenges to contemporary lawyers at the end of Part I. These challenges resonate more deeply now that we have examined the roots of Chinese law and taken a postmodern look at the very idea of comparing

392. He called natural law "the purest type of value-rational validity," but felt it insufficiently influenced actual conduct. WEBER, *supra* note 28, at 8-9.

393. See *id.* at 287 ("We encountered the *lex naturae* earlier as an essentially Stoic creation which was taken over by Christianity for the purpose of constructing a bridge between its own ethics and the norms of the world.") (footnote omitted).

394. See, e.g., *id.* at 206 ("In their purely external form, all 'sacred' laws tend to approximate a type which is shown most purely in Hindu law."); *id.* at 209 (arguing that Hindu law books give "a casuistic treatment of the legal data that lacks definiteness and concreteness, thus remaining juridically informal and but moderately rational in its systematization").

395. Cornell University Press's production values have done French proud. *The Golden Yoke* is a beautiful object and quite the most lavish legal monograph I have seen.

cultures. No doubt it is too much to claim that Tibet, Han China, and postmodernism speak on all matters with a single voice, but on two of French's challenges Lyotard, Rorty, and the Dalai Lama share enough common ground with Han dynasty intellectuals to make conversation possible.

The first area on which Tibet, China, and postmodernism converge (which is the first of French's eight propositions) is hostility to the "[o]mnipresent dualisms . . . [that] permeate the investigation, modeling, and presentation of Western material on legal systems."³⁹⁶ In relation to China, Hall has found that "[n]either dualism nor transcendence is present in the original Confucian or Taoist sensibilities."³⁹⁷ He explicitly uses the terms in their Derridean, epistemological sense:

One of the signal consequences of a logocentric language is that there must be real independence of a proposition from the state of affairs it characterizes. This entails dualistic relations of propositions and states of affairs. Without such independence, in the senses of dualism and transcendence, nothing like logical truth may be formulated.³⁹⁸

We must ask ourselves this question: Can we think of law, history, education, and moral behavior as aspects of the same big phenomenon? If we can, we are using a less dualistic approach to law and morality, prescription and description, fact and value. If we cannot, we are allowing a false notion of the autonomy of law to isolate us from relevant information.

The second area (which is French's sixth proposition) is anarchism and the degree of prominence that each culture allows to it. The Tibetans worked out a unique compromise between anarchism and law through their doctrine of "radically particular consent."³⁹⁹ Though this exercise in imagining new social possibilities was uniquely Tibetan, other cultures have treated anarchism as an honored strand in their high culture. In Part II, I discussed the anarchist countercurrent that lurks within Pali Buddhism,⁴⁰⁰ and in Part III, Peerenboom showed us the contribution to Huang-Lao jurisprudence of the Daoists, who were the nearest classical China had to an "anarchist tendency." For two millenia, legal identity in these Asian cultures has been construed out of a continuing debate for and against the state. By contrast, the anarchist theme was muted in Greece and Rome and did not emerge clearly in Europe until the nineteenth century. Even then, Pierre-Joseph Proudhon and Prince Peter Alexeivitch Kropotkin hardly attained the prominent place in European thought accorded to Johann Wolfgang von Goethe, Dante Alighieri, or William

396. FRENCH, *supra* note 1, at 343.

397. Hall, *supra* note 281, at 65.

398. *Id.* at 64.

399. FRENCH, *supra* note 1, at 345.

400. See *supra* notes 158–69 and accompanying text.

Shakespeare.⁴⁰¹ Perhaps Lyotard's musings on postmodern justice can be understood as a tribute to this anarchist impulse that surfaced with modernity: "[T]he essential heritage of the Enlightenment . . . demands that instead of killing, or putting in prison . . . one listen[] to the other and constitute[] the other through speech as an interlocutor."⁴⁰² Our challenge is to imagine how different life would now be if Cicero or Virgil had been an anarchist. Had anarchism been such an established part of our high culture that even opponents had to pay lip service to its attractions, how much difference would this have made to European history? Have we behaved in a more "statist" fashion than the rest of the world because our high culture has pushed anarchism into the background?

French's challenges remind us of how peculiar our legal tradition appears to the rest of the world. This European difference can be a cause for pride or for embarrassment. Let me quote again Hansen's wise words on what can be deduced from such cross-cultural comparisons: "Either of two morals can be drawn: [Either they] have a blind spot or we have an obsession."⁴⁰³ Readers of this *Journal* have an obsession with legal autonomy but a blind spot to the noble claims of anarchism. Or, if you prefer, postmoderns, Tibetans, and ancient Chinese are obsessed with anarchism but blind to legal autonomy.

We will not see the like of *The Golden Yoke* and *Law and Morality in Ancient China* again. The discovery of the Dead Sea Scrolls of Chinese law offered Peerenboom a unique opportunity. French will surely be the last anthropologist to have studied an undiluted premodern literate legal system by talking to its practitioners. Nonetheless, French and Peerenboom induce a premillennial optimism about the direction in which Asian legal studies are moving. The nineteenth-century founding fathers, Maine, Marx, and Weber, popularized bold hypotheses in lucid (and, in Marx's case, sparkling) prose. But their popularizations were premature, since the Asian data they so confidently synthesized was itself unreliable. No one now seriously believes that law moves inexorably from status to contract, or that cultures with the same means of production must share the same legal culture, or that Buddhism is an essentially otherworldly and antisocial religion. In this century, Asian legal studies reacted against premature synthesis by retreating into gritty detail. Scholars have preferred getting small things right to making risky hypotheses about big issues. Such scholarship, inevitably, is written for a specialist audience. Browsers seeking an informative introduction to, for example, Tibetan law are not attracted to such titles as *Early Tibetan Law Concerning Dog-Bite*,⁴⁰⁴ or *The Narrative of Legislation and Organization of the Mkhas-*

401. On the marginality of European anarchism, see JAMES JOLL, *THE ANARCHISTS* at viii-ix, 257-59 (2d ed. 1980).

402. van Reijen & Veerman, *supra* note 278, at 304 (quoting Lyotard).

403. Hansen, *supra* note 306, at 500.

404. Richardson, *supra* note 22.

pa'i dga'-ston: The Origins of the Traditions Concerning Sron-brcan sgam-po as First Legislator and Organizer of Tibet,⁴⁰⁵ or indeed *Die Handschriften in den City of Liverpool Museums (I)*.⁴⁰⁶ Yet these are three of the more important twentieth-century contributions to Tibetan legal history, pre-French. I take *The Golden Yoke* and *Law and Morality in Ancient China* as evidence that the pendulum may be swinging back. Both books expound highly technical material for the widest possible audience in an avowedly comparative framework. Perhaps we have amassed enough gritty detail to risk some new broad hypotheses. Perhaps the twenty-first century will take up the nineteenth-century program of explaining the legal traditions of Asia and Europe to each other.

Parts I and III summarized *The Golden Yoke* and *Law and Morality in Ancient China*. Parts II, IV, and V used the books as building blocks to construct a comparison between the three oldest written legal traditions of Eurasia. Applying the books so blatantly to my own comparative purposes might seem to abuse a reviewer's privileges. But my comparison is intended as an example of what these books make possible. For the small investment of three or four evenings spent reading them, one will painlessly achieve expertise in the emergence of Chinese written law and the final flourishing of Buddhist law at state level. Having read them, one can scarcely refrain from making comparisons. Readers who disagree with the comparative framework in this Review have all the material they need to construct their own. That is why *The Golden Yoke* and *Law and Morality in Ancient China* transcend their specialist fields of Tibetology and Sinology: They are "good to think" in that they promote fresh insights into the European legal tradition. If their reports on Asian legal cultures are enjoyed merely as ethnology, however, French and Peerenboom will have labored in vain.

405. G. Uray, *The Narrative of Legislation and Organization of the Mkhas-pa'i dga'-ston. The Origins of the Traditions Concerning Sron-brcan sgam-po as First Legislator and Organizer of Tibet*, 26 ACTA ORIENTALIA ACADEMIAE SCIENTIARUM HUNGARICAE 11 (1972).

406. R.O. Meisezahl, *Die Handschriften in den City of Liverpool Museums (I)*, 7 ZENTRALASIATISCHE STUDIEN DES SEMINARS FÜR SPRACH- UND KULTURWISSENSCHAFT ZENTRALASIENS DER UNIVERSITÄT BONN 221 (1973).

